117-280

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1236.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, APPELLANT,

vs.

COLLIS P. HUNTINGTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED DECEMBER 30, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a Supreme Court of the United States.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY *et al.*, Defendants.

On appeal.

It is hereby stipulated by the parties to the above-entitled cause that the pleadings and the petition to remove the cause, filed in the Scioto county court, and the bond accompanying the same and the motion to remand and the judgment entry thereon shall be printed; and the parties, in pursuance of the rules of the Court, stipulate that the remainder of the said record need not be printed.

KITTREDGE & WILBY,
Of Counsel for the F. T. & S. D. Co.
RAMSEY, MAXWELL & MATTHEWS,
Of Counsel for Plaintiff.

[Endorsed:] Supreme Court U. S., 1885. October term. No. 1236. The Fidelity Insurance, Trust, & Safe Deposit Co., app'l't, *vs.* Collis P. Huntington. Stipulation in regard to printing record. Filed Dec. 30, 1885.

1 At a stated term of the circuit court of the United States within and for the western division of the southern district of Ohio begun and held at the court-rooms in the city of Cincinnati, in the division and district aforesaid, on the first Tuesday of October, being also the sixth day of that month, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and tenth year of the Independence of the United States of America—present, the Honorable George R. Sage, one of the judges—among the proceedings had were the following:

COLLIS P. HUNTINGTON, Complainant,
vs.
THE SCIOTO VALLEY RAILWAY COMPANY, THE Central Trust Company of New York, The Fidelity Insurance, Trust, and Safe Deposit Company, Henry K. McHary, The Metropolitan Trust Company of the City of New York, Peltiah W. Huntington, John Groce, David Sinton, George Willard; John H. Holliday, Administrator of Jacob E. Kinsley, Deceased; Elizabeth Laudram, Administratrix of John Laudram, Deceased; Charles E. James, Administrator of George Galbraith, Dec'd; Martha E. Patton, P. Hayden & Co., and George W. A. Clough, Defendants.
} No. 3805. Chancery.

2 Be it remembered that heretofore, to wit, on the sixth day of October, in the year of our Lord one thousand eight hun-

dred and eighty-five, came the said defendant herein, the said The Fidelity Insurance, Trust, and Safe Deposit Company, as aforesaid, by Kittredge and Wilby, its solicitors, and filed in the clerk's office of the court aforesaid in this cause its certain transcript of proceedings theretofore had herein in the common pleas court of Scioto county, Ohio, and which said transcript so as aforesaid filed is clothed in the words and figures as follows, to wit:

3 *Transcript.*

THE STATE OF OHIO, } ss:
Scioto County, }

I, John H. Simmons, clerk of the court of common pleas within and for the county and State aforesaid, do hereby certify that the following transcript of original pleadings, docket and journal entries, is truly taken and correctly copied from the original pleadings now on file in this office, and the docket and journal of said court in the case of—

COLLIS P. HUNTINGTON
vs.
THE SCIOTO VALLEY RAILWAY COMPANY and Others. } No. 6527.

1885, May 29th.—Petition verified and filed, to wit:

Petition.

Court of Common Pleas of Scioto County, Ohio.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY, THE CENTRAL TRUST Company of New York, Samuel Thomas, The Fidelity Insurance, Trust, and Safe Deposit Company, Henry K. McHarg, The
4 Metropolitan Trust Company of the City of New York, Pelatiah W. Huntington, John Groce, David Sinton, George Willard; John H. Holliday, Administrator of Jacob E. Knisely, Deceased; Elizabeth Laudram, Administratrix of John Laudram, Deceased; Charles E. James, Administrator of George Galbraith, Deceased; Martha E. Patten, P. Hayden & Co., and George W. A. Clough, Defendants.

The said Collis P. Huntington complains and says:

1. Said defendant, The Scioto Valley Railway Company, was, at the times hereinafter mentioned, and still is, a railroad corporation duly incorporated under the laws of the State of Ohio, and owns and operates a railroad between the city of Columbus, in the county of Franklin, Ohio, and a point opposite Ashland, Kentucky, in the village of Petersburg, in the county of Lawrence, Ohio, which said railroad passes into and through the counties of Franklin, Pickaway, Ross, Pike, Scioto, and Lawrence, in said State of Ohio.

5 2. Said defendant, The Central Trust Company of New York, is a corporation duly incorporated under the laws of

the State of New York; said defendant, The Fidelity Insurance, Trust, and Safe Deposit Company, is a corporation duly incorporated under the laws of the State of Pennsylvania; said defendant, The Metropolitan Trust Company of the City of New York, is a corporation duly incorporated under the laws of the State of New York.

3. On the 29th day of May, A. D. 1885, said plaintiff recovered a judgement against said defendant, The Scioto Valley Railway Company, duly given by the court of common pleas of Lawrence county, in the State of Ohio, for the sum of six hundred and thirty-nine thousand three hundred and five dollars and sixty-seven cents, ($639,305.67,) and twenty dollars costs of suit in an action wherein said plaintiff was plaintiff and said Scioto Railway Company was defendant, which judgment is in full force and wholly unpaid and unsatisfied.

4. Said plaintiff afterward caused several executions to be issued upon said judgment against the property of said Scioto Valley Railway Company, and respectively directed to the sheriffs of the counties of Lawrence, Scioto, Pike, Ross, Pickaway, and Franklin, in
6 said State of Ohio. Said executions were duly levied by the sheriffs to whom they were severally directed on many passenger and freight cars, locomotive engines, and various supplies, machinery, tools, and other personal property of said railway company and were also levied on the railroad of said Scioto Valley Railway Company, extending from Columbus, at a point known as Caldwell, in said county of Franklin; thence southwardly through said counties of Franklin, Pickaway, Ross, Pike, and Scioto, through the towns and cities of Lockbourne, Ashville, Circleville, Kingston, Chillicothe, Waverly, and Piketon, into the city of Portsmouth, in said Scioto county; and thence eastwardly through said counties of Scioto and Lawrence, and through the cities of Portsmouth and Ironton to a point at Petersburgh station, in said county of Lawrence, on the Ohio river and opposite to Ashland, Kentucky, and being all the railroad of said Scioto Valley Railway Company in said State, with the privileges and appurtenances, railroad bed and rights of way, depots and depot grounds, side tracks and switches, bridges, culverts, iron, and iron rails, and all structures and improvements on said lands now owned or occupied or used by said railway company; and said executions were also levied on certain
7 other pieces of real estate in said counties of Franklin and Scioto used by said railway company for machine shops, freight yards, and grounds, offices, &c.

5. Said Scioto Valley Railway Company has not personal or real property subject to levy sufficient to satisfy said judgment of said plaintiff.

6. On the 15th day of October, A. D. 1875, said Scioto Valley Railway Company made and executed to Peter Ambos and John Beatty, as trustees, its certain mortgage or deed of trust, and thereby conveyed, by way of mortgage, to said trustees and their heirs and assigns, that part of its railroad aforesaid which extends from said city of Columbus, in said Franklin county, to said city of Portsmouth, in said Scioto county, with its privileges, appurtenances, and also

certain rolling-stock and other personal property of said railway company to secure payment to the holders of certain coupon bonds of said company, namely, one thousand bonds for $1,000 each, amounting to $1,000,000; six hundred bonds for $500 each, amounting to $300,000, all of even date with said mortgage and payable to Joseph Black, or bearer, in the city of New York, on the 1st day of January, A. D. 1896, with interest from January 1st, 1876, at the rate of seven per cent. per annum, payable semi-annually. Said mortgage provided that until in default for six months in the
8 payment of said bonds or interest said railway company should retain possession of said mortgaged railroad and property, and might take and use the rents, profits, and income thereof. Said mortgage was filed for record in the offices of the recorders of said Franklin county on October 21st, 1875, and of said Pickaway county on October 23d, 1875, and of said Ross county on October 25th, 1875, and of said Pike county and Scioto Co. on October 26th, 1875. Said Ambos and Beatty having resigned as trustees, said railway company, by its supplemental mortgage made on the 5th day of September, 1876, substituted said defendant, The Fidelity Insurance and Safe Deposit Company, as trustee therein. Said supplemental mortgage was filed for record in the offices of said recorders of said counties of Franklin, Pickaway, Ross, Pike, and Scioto on the 19th, 20th, [and] 21st days of September, 1876.

7. On the 18th day of February, A. D. 1879, said Scioto Valley Railway Company made and executed to said defendant, Samuel Thomas, as trustee, its certain mortgage or deed of trust, and thereby conveyed, by way of mortgage, to said trustees and his heirs and assigns, that part of its railroad aforesaid which extends from said city of Columbus, in said Franklin county, to said city of
9 Portsmouth, in said Scioto county, with its privileges and appurtenances, and also certain rolling-stock and other personal property of said railway company, to secure payment to the holders of five hundred coupon bonds of said company for $1,000 each, and amounting to $500,000, all of even date with said mortgage, and payable to Samuel Thomas, or bearer, in the city of New York, on the 1st day of April, A. D. 1894, with interest from the 1st day of April, A. D. 1879, at the rate of seven per cent. per annum, payable semi-annually. Said mortgage provided that said railway company, until in default for six months in the payment of said bonds or interest, should retain possession of said mortgaged railroad and property, and might take and use the rents, profits, and income thereof.

Said mortgage was filed for record in the offices of the recorders of said Franklin, Pickaway, and Ross counties on February 20th, 1879, and of said Pike and Scioto counties on February 21st, 1879.

8. On the 7th day of September, A. D. 1880, said Scioto Valley Railway Company made and executed to said defendant, The Central Trust Company of New York, as trustee, its certain mortgage or deed of trust, and thereby conveyed, by way of mortgage,
10 to said trustee and its successors and assigns, all its said railroad, extending from its terminus in said city of Columbus,

in said Franklin county, southwardly through said counties of Franklin, Pickaway, Ross, Pike, and Scioto to said city of Portsmouth, and from said city of Portsmouth eastwardly through said counties of Scioto and Lawrence to its terminus at a point in said Lawrence county opposite the city of Ashland, Boyd county, Kentucky, with its privileges and appurtenances, and also certain rolling-stock and other personal property of said railway company, to secure payment to the holders of twenty-one hundred coupon bonds of said company for $1,000 each, and amounting to $2,100,000, all of even date with said mortgage, and payable to the Central Trust Company of New York, or bearer, in the city of New York, on the 1st day of July, A. D. 1910, with interest from the 1st day of July, A. D. 1880, at the rate of seven per cent. per annum, payable semi-annually. Said mortgage provided that said railway company, until in default for six months in the payment of said bonds or interest, should retain possession of said mortgaged railroad and property, and might take and use the rents, profits, and income thereof.

11 Said mortgage was filed for record in the offices of recorders of said counties of Franklin, Pickaway, Ross, Pike, and Scioto and Lawrence on the 13th day of September, A. D. 1880.

9. On the 1st day of May, A. D. 1881, said Scioto Valley Railway Company made and executed to said defendant, Henry K. McHarg, as trustee, its mortgage or conveyance in trust, and thereby conveyed, by way of mortgage, to said trustee, certain of its rolling-stock and equipment to secure payment to the holders of four hundred coupon bonds of said company for $1,000 each, and amounting to $400,000, all of even date with said mortgage and payable to Henry K. McHarg, or bearer, in the city of New York, on the 1st day of May, A. D. 1896, with interest from the 1st day of May, A. D. 1881, at the rate of seven per cent. per annum, payable semi-annually.

10. On the 1st day of February, A. D. 1883, said Scioto Valley Railway Company made and executed to said defendant, The Metropolitan Trust Company of the City of New York, as trustee, its certain mortgage or deed of trust, and thereby conveyed, by way of mortgage, to said trustee and its successors and assigns, all its said railroad aforesaid, with its privileges and appurtenances, and also certain rolling-stock and other personal property, to secure

12 payment to the holders of seven thousand five hundred coupon bonds of said company for $1,000 each, all of even date with said mortgage and payable to bearer, in the city of New York, on the 1st day of September, A. D. 1922, with interest from the 1st day of September, A. D. 1882, at the rate of six per cent. per annum, payable semi-annually. Said mortgage was filed for record in the offices of the recorders of said Franklin, Pickaway, Pike, Scioto, and Lawrence counties on February 20th, 1883, and of said Ross county on February 19th, 1883.

11. Said defendant, John Groce, claims to have a mortgage lien on the ground upon which is situated the depot of said railway company at said city of Circleville.

Said defendant, Peletiah W. Huntington, claims to have a mort-

gage lien on the house and lot in said city of Columbus which is occupied by said railway company for general offices.

Said defendant, David Sinton, claims to have a mortgage lien on certain land in said city of Chillicothe occupied by said railway company as a freight yard.

Said defendant, George Willard, claims to have a vendor's lien on some land occupied by said railway company as its freight and depot yard at its station of Petersburgh.

13 Said defendant, John H. Holliday, as the administrator of the estate of Jacob E. Knisely, deceased, and said defendant, Marth E. Patten, claim to have a judgement lien on that part of said railroad which lies in said Scioto county.

Said defendant, Elizabeth Laudram, as administratrix of the estate of John Laudram, deceased, and said defendant, Charles E. James, as administrator of the estate of George Gilbraith, deceased, claim to have judgement lien on that part of said railroad which lies in said county of Ross.

Said defendant, George W. A. Clough, claims to have a judgement lien on that part of said railroad which lies in said county of Pike.

12. By virtue of his said judgement and levies said plaintiff has a valid lien on said railroad and property, but it is impossible to sell said real estate upon execution at law. Said railroad is now operated as an entirety, and said plaintiff cannot disconnect and remove said personal property so levied upon without stopping the opperation of said railroad and impairing the value of said real and personal property as an entirety and a going concern.

14 Said Scioto Valley Railway Company has not the means or credit to longer keep said road in repair and to maintain the same in good and safe condition so as to discharge its duties to the public with safety and dispatch.

13. Said defendant-, P. Hayden & Co., are an incorporated association of persons formed for the purpose and doing business in this State under the firm name of P. Hayden & Co. Said P. Hayden & Co. have money in their possession belonging to said Scioto Valley Railway Company and are indebted to said Scioto Valley Railway Company, and said plaintiff is entitled to have said money and indebtedness subjected and applied to the payment, as far as the same will go, of his said judgement.

14. Said plaintiff is entitled to subject to the payment of his said judgement any and all interest which said Scioto Valley Railway Company has as mortgageor or otherwise in said railroad, and in any and all of the real and personal estate hereinbefore mentioned, and any and all earnings or money due or to become due from or in respect of the operation of said railroad and property.

15. The consideration for said judgement so recovered by said plaintiff against said Scioto Valley Railway Company was the supplying and laying steel rails and supplying locomotives and cars to

15 said railway company and bettering and improving the said railroad and its equipment and in advances of money to be used, and which were used, for the purposes aforesaid, and all said supplies and moneys went into the betterment of said property,

and thereby of the security of all holders of liens thereon, and said plaintiff is entitled to an equitable lien on said railroad and equipment and property, and upon any fund that may be created from the use or operation or sale thereof for all money so used, advanced, and applied. Wherefore said plaintiff prays that an injunction may be granted restraining said Scioto Valley Railway Company from selling or otherwise disposing of any of its property or effects, real or personal, without the further order of this court.

That a receiver may be appointed of all and singular the said railroad, with all its appurtenances and rolling-stock and equipment, and of all the property and effects, both real and personal, of said Scioto Valley Railway Company, and that said company and all other persons having in their possession or under their control any property or effects, real or personal, of said company, be ordered to deliver the same to said receiver, and that said receiver be clothed with authority to collect all claims due or that may become due to said company, and to recover all property to which it may be entitled, and to operate said road and carry on the business
16 thereof subject to the control of this court, and under such regulations as it may prescribe, until the further order of the court herein; that any and all interest which said Scioto Valley Railway Company has as mortgageor or otherwise in said railroad and its equipment, rolling-stock, and appurtenances, and in any property or effects, real or personal, and the net income and earnings of said railroad and property, or in respect of the operation of said railroad and property, may be subjected and applied to the payment of plaintiff's said judgement; that any money of said railway company in the bank of said P. Hayden & Co., or owing by them to said railway company, may be subjected and applied to the payment of plaintiff's said judgement; that the equitable lien of said plaintiff on said railroad and property may be enforced.

That the several defendants in this action holding claims against said Scioto Valley Railway Company or its property may set forth the same; that the court will ascertain and marshal all such claims and liens and settle the orders of priority between them, and that said railroad, with its appurtenances, rolling-stock, and equipment, and all other real estate, goods, and chattels of said Scioto Valley Railway Company, may be sold as an entirely or in such parcels as the court may order, and that the proceeds be applied to the payment of plaintiff's said judgement, and that the court will make all
17 such other or further orders respecting the disposition or sale of said property as equity may require, and for such further and other relief as may be proper in the premises.

W. A. HUTCHINS,
HARRISON, OLDS & MARSH,
Attorneys for Plaintiff.

STATE OF OHIO, }
Scioto C-. } *ss:*

Edward St. John, being duly sworn, says he is the agent of said

plaintiff, Collis P. Huntington, and is duly authorized in the premises; that said plaintiff is a non-resident of, and is now absent from, said county of Scioto, and that the facts stated and allegations contained in the foregoing petition of said Collis P. Huntington are true.

EDWARD ST. JOHN.

Sworn before me and subscribed in my presence by said St. John this 29th day of May, A. D. 1885.

JOHN H. SIMMONS, *Clerk.*

To the clerk:

Issue summons upon the foregoing petition for said defendant, The Scioto Valley Railway Company, The Central Trust Company of New York, Samuel Thomas, The Fidelity Insurance, Trust,
18 and Safe Deposit Company, Henry K. McHarg, and The Metropolitan Trust Company of the City of New York, directed to the sheriff of Scioto Co.; and for said defendants, Peletiah W. Huntington and P. Hayden and Co., directed to the sheriff of Franklin Co.; and for said defendant, John Groce, directed to the sheriff of Pickaway county; and for said George W. A. Clough, Elizabeth Laudram, administratrix of John Laudram, deceased; Charles E. James, administrator of George Gilbraith, deceased, directed to the sheriff of Ross county; and for said defendants, John H. Holliday, administrator of Jacob E. Knisely, deceased; Martha E. Patten, directed to the sheriff of Scioto county; and for said defendant, David Sinton, directed to the sheriff of Hamilton county; and for said defendant, George Willard, directed to the sheriff of Lawrence county.

W. A. HUTCHINS,
HARRISON, OLDS & MARSH,
Attorneys for Plaintiffs.

[Folios 19 to 22 are omitted.]

23 1885, May 29th.—Answer of the Scioto Valley Railway Compa-y verified and filed as follows, to wit:

Answer.

THE STATE OF OHIO, *Scioto County:*

Court of Common Pleas.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY and Others, Defendant-.

The said The Scioto Valley Railway Company, defendant, by W. H. Enocks, its attorney, by warrant of attorney duly authorized, now comes and waives the issuing and service of process and enters its appearance, and for answer says:

It admits the facts stated in the petition filed by the said
24 Collis P. Huntington to be true and waives notice as to time of the application for the appointment of a receiver and consents that such receiver be now appointed, as prayed for in said petition. Said warrant of attorney authorizing said W. H. Enochs thus to appear and act for said company is herewith filed.

THE SCIOTO VALLEY RAILWAY COMPANY,
By W. H. ENOCHS, *As Attorney.*

SCIOTO COUNTY, *ss:*

W. H. Enochs, being first duly sworn, says he is the attorney of the Scioto Valley Railway Company, by warrant of attorney herewith filed, duly authorized in this behalf; and he further says he believes the facts stated and allegations made in the foregoing pleading are true.

W. H. ENOCHS.

Signed and sworn to by the said W. H. Enochs in my presence and before me May 29th, 1885.

J. H. SIMMONS, *Clerk.*

[Folios 25 to 47 are omitted.]

48 1885, June 18th.—Answer and cross-petition of John Groce filed as follows, to wit:

Answer and Cross-Petition of John Groce.

THE STATE OF OHIO, *Scioto County:*

County Court of Common Pleas.

COLLIS P. HUNTINGTON, Plaintiff,
vs.
THE SCIOTO VALLEY RAILWAY COMPANY and Others, Defendants.

49 And now comes John Groce and answers the petition of Collis P. Huntington against him and others, and for his separate answer and cross-petition thereto he says:

That heretofore, to wit, on the 22nd day of March, A. D. 1878, he was the owner in fee-simple of the following premises, situate in Pickaway county, Ohio, bounded and described as follows, viz: Beginning at the northwest corner of lot 24, in A. Huston's 1st addition to the town now city of Circleville; thence with the north line S. 68° E. 46½ feet; thence N. 21° E. 20 feet to a stake; thence S. 68° E. 135 feet to a stake in the west line of Scioto street; thence N. 21° E. 18½ poles to the middle of Hargus creek; thence down the middle of said creek N. 26° W. 12 poles; thence S. 82° W., passing directly over the keystone in the large culvert in the canal, 11 poles to a stake in the east edge of the Ohio canal; thence down the canal S. 8° W. 6¼ poles to a stake; thence S. 29° E. 3 poles to a stake; thence

S. 11° W. 7 poles & 7 links to a stake; thence S. 70° E. 2 poles to a stake; thence S. 19° W. 60 poles & 20 links to the beginning, containing 2 acres and 25 poles of land, being a part of section — to 19, T'p No. 11, R. 21 W. S. That on the said 22nd day of March, 1878, he conveyed the same in fee-simple to one George D. Chapman in trust for his, codefendant herein, The Scioto Valley Railway Company, for the sum of $1,500.00, to be paid as follows, viz: $300.00, cash in hand, which was paid, and $600.00 on the 21st day
50 of March, 1879, with interest at the rate of 7 per cent. per annum, payable annually, and $600.00 on the 21st day of March, 1880, with interest at the rate of 7 per cent. per annum, payable annually, and that to secure the payment of said sum of $1,200.00, twelve hundred dollars, the residue of said purchase-money for said premises heretofore described, together with the interest thereon, the said George D. Chapman, trustee as aforesaid, on the 26th day of March, 1878, executed and delivered to this respondent his two promissory notes of that date for $600.00 each, and due, respectively, one on the 21st day of March, 1879, and one the 21st day of March, 1880, both bearing interest at the rate of 7 per cent. per annum, payable annually, and at the time of delivering said two notes, and to secure the payment of the said indebtedness, the said George D. Chapman duly executed and delivered to this defendant his mortgage deed of that date conveying to this defendant the aforesaid-described premises.

Said mortgage was conditional that if said George D. Chapman, trustee, should pay said several sums of money to the said John Groce, or his assignees, when the same respectively became due, with the interest, then the said presents were to be void.

On the 8th day of April, 1878, at 1 o'clock and 25 minutes of said day, the said mortgage was duly left for record at the recorder's office of Pickaway county, Ohio, and was duly recorded in book 13, page 317, of the records of mortgages in said county. The
51 said claims are past due, the interest has been paid on the whole of said claim up to March 21st, 1885, and before said 21st day of March, 1885, $200.00 was paid to this respondent on the principal of said claim, leaving due to this defendant for said purchase-money for said land secured by said mortgage the sum of one thousand dollars ($1,000), together with the interest thereon from the 21st day of March, 1885, at the rate of 7 per cent. per annum, payable annually, and the same is the first lien on said premises hereinbefore described.

This defendant therefore prays that in default of payment of the amount now due and payable on said claim, together with the interest thereon the 21st day of March, 1885, at 7 per cent. per annum, payable annually, that said mortgage be foreclosed, and the said premises may be sold free of all claims of the plaintiff and of his codefendants herein, and that the proceeds of said sale be applied to the payment of the debt due this defendant, together with the

interest thereon, and that he may have such other and further relief in the premises as the nature of the case may require.

P. C. SMITH,
MILT. MORRIS,
Attorneys for Groce.

THE STATE OF OHIO, }
Pickaway County, } ss:

John Groce, being duly sworn, says that he is one of the
52 defendants in the foregoing action, and that he believes the facts stated in the foregoing answer and cross-petition are true.

JOHN GROCE.

Sworn to by said John Groce before me and subscribed in my presence this 15th day of June, 1885.

M. A. SWEETMAN,
Notary Public within and for said County.

25 cts. paid by Groce.

1885, June 25th.—Answer and cross-petition of George W. A. Clough filed as follows, to wit:

Answer and Cross-Petition of George W. A. Clough.

Court of Common Pleas, Scioto County, Ohio.

COLLIS P. HUNTINGTON
against
THE SCIOTO VALLEY RAILWAY COMPANY, GEORGE W. A. CLOUGH, and Others.

The defendant, George W. A. Clough, answering the plaintiff's petition, says:

Answer.

It is true that he claims to have a judgement lien on that part of the railroad of his codefendant, The Scioto Valley Railway Company, that lies in the county of Pike and State of Ohio, and he avers that by the rendition of the judgement, hereinafter set forth by way of cross-petition, that the lands, tenements, vested interests therein, and the railroad of the said Scioto Valley Railway Company,
53 defendant, within the said county of Pike, were bound (and are still bound) for the satisfaction of said judgement from the 4th day [of] May, 1885, and that said lien is prior and paramount to any lien thereon of the plaintiff's cross-petition. At the May term of the court of common pleas of thesaid county of Pike and State of Ohio, A. D. 1885, commenced and held on the 4th day of May, 1885, this defendant recovered, by the consideration of said court, judgement against his codefendant, The Scioto Valley Railway Co., in the sum of $597.60, with interest thereon from the 1st day of January, A. D. 1879, in a certain civil action then pending in said court,

wherein this defendant was plaintiff, and the said Scioto Valley Railway Company was defendant, and also for his costs in and about said action expended, taxed at the sum of $127.76. Said judgement is in full force and wholly unsatisfied. There is due thereon the sum of $725.36, with interest on five hundred ninety-seven and sixty-one hundred ($\frac{60}{100}$) dollars thereof from January 1st, 1879, and with interest on one hundred and twenty-seven and $\frac{76}{100}$ dollars thereof from May 4th, 1885. Wherefore this defendant asks that the claimants to and lien holders on the property, rights, privileges, and franchises of the said Scioto Valley Railway Co., defendants, be compell-d to assert their claims, if any they have, in said property, that the court will adjust the priorities thereof and of the lien of this defend-
54 ant, and that said property may be ordered sold, and the proceeds distributed among the claimants, according to their respective priorities, as the same may be settled by the court, and for other proper relief.

GEORGE W. A. CLOUGH,
Defendant.
By T. C. ANDERSON, *Attorney.*

STATE OF OHIO, } ss:
Ross County }

The said George W. A. Clough, defendant, being first duly sworn, says that the facts stated and averments contained in his foregoing pleading are, as he believes, true.

GEORGE W. A. CLOUGH.

Signed in my presence and sworn to before me this June 24th, 1885.

W. JOE ATWELL,
Notary Public, Ross County, Ohio.

1885, June 27th.—Answer and cross-petition of David Sinton filed as follows, to wit:

Court of Common Pleas, Scioto County, Ohio.

COLLIS P. HUNTINGTON
against
THE SCIOTO VALLEY RAILWAY COMPANY, THE CENTRAL Trust Company of New York, Samuel Thomas,
55 The Fidelity Insurance, Trust, and Safe Deposit Company, Henry K. McHarg, The Metropolitan Trust Company of the City of New York, Peletiah W. Huntington, John Groce, David Sinton, George Willard; John H. Holliday, Administrator of Jacob E. Knisely, Deceased; Elizabeth Laudram, Admi'x of John Laudram, Deceased; Charles E. James, Administrator of George Galbraith, Deceased; Martha Patton, P. Hayden & Co., and George W. A. Clough, Defendants. } No. 6527.

And now comes the said David Sinton, one of the defendants in

this action, and for answer to the petition of the plaintiff, and by way of cross-petition in this action, says it is true, as alleged in said petition, that he claims to have and has a mortgage lien on certain lands in the city of Chillicothe, Ohio, occupied by said Scioto Valley Railway Company as a freight yard.

That the said lands are known and described as out lots numbered one hundred and four (104) and one hundred and six (106), in the city of Chillicothe, Ross county, Ohio, being the same premises of which Edward P. Pratt, late of said city of Chillicothe, died seized; and the same premises which were conveyed by William S. Porter, Edward P. Porter, Alice M. Porter, and Martha S. Porter, the heirs and legal representatives of said Edward P. Pratt, deceased, to George D. Chapman, trustee, by deed bearing date April 30th, 1878, and duly recorded in the recorder's office of the said
56 county of Ross.

That the said George D. Chapman, trustee, on or about March 7th, 1878, purchased said premises of said William S. Porter, Edward P. Porter, Alice M. Porter, and Martha S. Porter, and as and for a part of the purchase-money by him agreed to be paid for said premises executed and delivered unto the said William S. Porter, Edward P. Porter, Alice M. Porter, and Martha S. Porter his five certain promissory notes, in writing, each dated March 7th, 1878, for the sum of one thousand dollars each and payable to their order at one, two, three, four and five years after date, respectively, with interest thereon at the rate of 8 per cent. per annum, payable annually; and upon the delivery of said deed of conveyance for said premises, bearing date April 30th, 1878, to said George D. Chapman, trustee, he made and delivered to said William S. Porter, Edward P Porter, Alice M. Porter, and Martha S. Porter his certain deed of conveyance, by way of mortgage, bearing date May 25th, 1878, the said delivery being made at the same time with the delivery to him of the deed aforesaid, and thereby granted, bargained, sold, and conveyed unto the said William S. Porter, Edward P. Porter, Alice M. Porter, and Martha S. Porter, their heirs and assignes, forever the same premises which they had conveyed to him as aforesaid, the said conveyance to said George D. Chapman, trustee, having
57 thereunder written a condition by which it was provided that if the said George D. Chapman, trustee, should well and truly pay the said several promissory notes so given by him in part payment of the purchase-money for said premises, when the same should, respectively, become due according to the tenor and effect of the same, then those presents to become void, otherwise the same to remain in full force and virtue; that said conveyance, by way of mortgage, was deposited for record in the recorder's office of said Ross County, on May 28th, 1878, at 11.58 o'clock a. m., and was recorded on the same day in volume 19 of the mortgage records of said county, pages 403 and 404; that the said note for $1000.00, payable in one year from the date thereof, and also the interest on said other notes up to March 7th, 1879, was paid to the payees of said notes, or their assigns, on or about said March 7th, 1879, and thereafter in the month of May, 1879, the said William S. Porter,

Edward P. Porter, Alice M. Porter, and Martha S. Porter, for value received, endorsed and delivered said four remaining unpaid notes to this respondent, David Sinton; that at the same time William S. Porter, Edward P. Porter, Alice M. Porter, and Martha S. Porter, for value received, assigned to this respondent all their right, title, and interest to and in said mortgage given to secure the payment of said notes as aforesaid.

58 This respondent further says that he is ignorant of *of* the trust upon which George D. Chapman took said conveyance to him for said premises, except that he was informed that said premises had been bought in the interest and for the use of the said Scioto Valley Railway Company, and that the payments which had been made on account of the purchase-money for said premises were made by said company, and he is advised that the said George D. Chapman, trustee, at the request of said company and for the consideration of one dollar, conveyed said premises to one Charles O. Hunter, trustee, of Franklin county, Ohio, by deed dated September 16th, 1880, and recorded September 25th, 1880, in volume No. 89, page 10, of the deed records of the said Ross Co. The terms of the trust upon which the said Hunter took said conveyance are not expressed in said deed, but this respondent is advised and believes that he holds said premises in the interest and for the use and benefit of said Scioto Valley Railway Company, subject to the prior and paramount lien of this respondent under the mortgage hereinbefore set forth. This respondent further says that the second note in said series of notes, to wit, the one payable two years after date thereof, together with the interest on the remaining three notes up to the 1st day of August, 1884, has been paid by said Scioto Valley Railway Co.; that there is now due him on each of said three unpaid notes the sum of one thousand dollars, with interest thereon from

59 said 1st day of August, 1884, at the rate of eight per cent. per annum. Copies of said notes and of the endorsements thereon and of said mortgage deed to said William S. Porter and others and of their assignment thereof to this respondent are attached hereto and filed herewith.

This respondent says that his lien on said premises, by reason of said mortgage and the assignment thereof as aforesaid for the payment of said notes and interest, is prior and paramount to that of the said plaintiff, and also to any lien of any of his codefendants in this action, and that he is entitled to have the same paid by said Scioto Valley Railway Company or by the receiver in this action out of any earnings that may come into his hands from the operation of said Scioto Valley railway, or otherwise, in preference to any other claim whatsoever. Wherefore this respondent prays, the premises considered, that the said Charles O. Hunter may be made a defendant in this action, and that he may answer herein that the amount due this respondent on said three remain[in]g notes may be ascertained and the priority of this respondent's lien on said premises declared and established, and that an order and judgment may be made requiring the amount so found to be due this respondent to be paid to him within a short day, to be named by the court, by the

receiver in this action out of any funds that may be in or that may come into his hands as such receiver or by the Scioto Valley
60 Railway Company, or some party herein in its behalf, and in default thereof that said mortgage- premises may be sold and the proceeds applied to the payment of said amount and the cost of this respondent herein incurred and expended, and for such other and further relief as the circumstances of the case may require.

DAVID SINTON,
By McCLINTICK AND SMITH,
His Attorneys.

THE STATE OF OHIO, } *ss:*
Hamilton County, }

David Sinton, the respondent in the foregoing answer and cross-petition, on sol-m- oath says that the facts stated in said answer and cross-petition are true, as he verily believes.

DAVID SINTON.

Sworn to by Davin Sinton before me and subscribed by him in my presence this 26th day of June, A. D. 1885, as witness my hand and notarial seal.

[SEAL.] HENRY OEHLMEYER,
Notary Pub., Ham. Co., O.

40 cts. paid by affiant.

[Folios 61 to 279 omitted.]

280 1885, July 20th.—Answer and cross-petition of Pelatiah W. Huntington received and filed by consent as follows, to wit:

Answer and Cross-Petition of Pelatiah W. Huntington.

Court of Common Pleas, Scioto County, Ohio.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY *et al.*, Defendant-. } No. 6527.

Now comes Pelatiah W. Huntington, one of the defendants, and for his answer and cross-petition herein says: That on or about the 6th day of December. A. D. 1869, one Theodore W. Tallmadge executed and delivered his promissory note of that date to one Robert K. Sieg, and thereby promised to pay the said Robert K. Sieg or order, in three years after date of the said note, the sum of
281 eleven thousand dollars, with interest at eight per cent. per annum, payable annually; that on or about the said 6th day of December, A. D. 1869, the said Theodore W. Tallmadge, being then seized in fee-simple of the premises hereinafter described, did, with his wife, Hallie Tallmadge, by their mortgage deed of that date, duly convey to the said Robert K. Sieg, his heirs and assigns forever, the following-described premises, to wit: Situate in the county of Franklin, State of Ohio, and in the city of Columbus, and bounded and described as follows, to wit: Lot No. four hundred and forty-

two (442), in said city of Columbus, Ohio, being the same premises conveyed to the said Tallmadge by the executors of William A. McCoy, deceased, by deed dated Feb. 15th, 1866. The condition of said mortgage deed was in substance that if the said Theodore W. Tallmadge, or any one for him, should punctually pay the said note and the interest thereon when due, then the said conveyance should be null and void; otherwise to be and remain in full force and virtue in law.

The said mortgage was duly filed for record in the recorder's office — said Franklin Co., Ohio, *of* the 6th day of December, A. D. 1869, at 11 o'clock a. m., and duly recorded in mortgage record No. 33, page- 143 & 144.

On or about the said 6th day of December, A. D. 1869, the said Robert K. Sieg, for full value, indorsed and transferred and delivered the said note and the mortgage securing the same to the Home Insurance Company of Columbus, Ohio.

282 On or about the 30th day of December, 1876, the said Home Insurance Company, for a full value, sold, assigned, and transferred the said note and the mortgage securing the same to the defendant, Peletiah W. Huntington, who is still the owner and holder thereof.

There has been paid on the principal of said note the sum of five thousand dollars and the interest to the 25th day of March, A. D. 1885, and no more. There is due to this defendant upon the said note the sum of six thousand dollars, with interest thereon at eight per cent. per annum, payable annually, from the said 25th day of March, A. D. 1885.

A copy of the said note, with all the credits and endorsements thereon, is hereto annexed and made part hereof, marked "A."

This defendant further says that on or about the 27th day of November, A. D. 1871, the said Theodore Tallinmadge and Hallie, his wife, by their deed of that date, sold and conveyed the said premises, and all their right, title, and interest therein, to one William A. Neil, subject to the said mortgage indebtedness, which the said William A. Neil then assumed and agreed to pay.

On or about the 5th day of June, 1872, the said William A. Neil, by his deed of that date, sold and conveyed the said premises, and all his right, title, and interest therein, to one Anne Eliza Wormley, the wife of one Theodore Wormley, subject to the said mortgage indebtedness which the said Anne Eliza Wormley there as-

283 sumed and agreed to pay.

On or about the 25th day of March, 1879, the said Theodore Wormley and wife, by their deed of that date, sold and conveyed the said premises, and all their right, title, and interest therein, to one Lacia I. Chapman, the wife of one George D. Chapman, subject to the said mortgage indebtedness, which the said Lacia Chapman then assumed and agreed to pay as part of the purchase-money for said premises.

On or about 31st day of January, A. D. 1880, the said George D. Chapman and Lacia I. Chapman, his wife, by their deed of that date, sold and conveyed the said premises, and all their right, title,

and interest therein, to the defendant, The Scioto Valley Railway Company, subject to the said mortgage indebtedness, the principal of which had become reduced to $6,000.00, which said indebtedness, with the interest thereon, the said Scioto Valley Railway Company, as a part of the consideration for said conveyance, then assumed and agreed to pay. The said premises are the same referred to in the petition as the house and lot in the said city of Columbus which are occupied by the said railway company.

Defendant says that by reason of the premises the said mortgage has become absolute, and that he is entitled to have the same foreclosed.

Wherefore defendant prays that this court will find the amount due him upon the said note and mortgage, and will decree that the said Scioto Valley Railway Company pay the same within
284 some short day, and that in default thereof the said premises be ordered sold according to law, and the proceeds applied to the payment of this defendant's said mortgage lien, and for all other relief.

WATSON & BURR,
Attorneys for Defendant.

285 STATE OF OHIO, }
Franklin County, } *ss:*

Peletiah W. Huntington, being duly sworn, deposes and says that the facts stated and the allegations of his foregoing answer and cross-petition are true, as he believes.

PELETIAH W. HUNTINGTON.

Sworn to before me and subscribed in my presence by the said Pelatiah W. Huntington this 16th day of June, A. D. 1885.

WILLIAM F. McCLURE,
Notary Public in and for Franklin County, Ohio.

Fee, 40 cts., collected.

[Folios 286 and 287 omitted.]

288 Court of Common Pleas Scioto County, Ohio. In Chancery.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY, THE FIDELITY INSURANCE, TRUST, AND SAFE DEPOSIT COMPANY, and Others, Defendants.

The answer and cross-petition of the Fidelity, Trust, and Safe Deposit Company, answering for itself alone, and not for any of the other defendants, to the petition of Collis P. Huntington, respectfully shows:

First. That defendant admits the truth of the statement of fact contained in the first and second paragraphs of the plaintiff's petition, and also so much of the third paragraph as relates to the entering

by the plaintiff in the court of common pleas of Lawrence county of a judgement against the defendant, The Scioto Valley Railway Company for $639,305.67, but whether the amount remains wholly unpaid and unsatisfied this defendant has no knowledge, and it therefore asks that the plaintiff Co. [be] required to make proof of the same.

289 Second. This defendant admits that the plaintiff caused executions to be issued as stated in the fourth paragraph of the plaintiff's petition, and that under said executions the plaintiff claims to have made a levy upon the property in the said paragraph mentioned; but this defendant denies the right of the *defendant* to levy upon said property, in contravention of the rights of this defendant as mortgagee, which are more particularly stated in the fourth paragraph of this answer.

Third. This defendant has no knowledge of the matters referred to in the fifth paragraph of the plaintiff's petition.

Fourth. As to the statement contained in the sixth paragraph of plaintiff's petition, this defendant says that the Scioto Valley Railway Company on the fifteenth day of October, 1875, made [and] executed to Peter Ambos and John Beatty, as trustees, its certain mortgage or deed of trust, and thereby conveyed, by way of mortgage, to said trustees, their heirs and assigns, all its then railroad from the city of Columbus to the city of Portsmouth, in and through the counties of Franklin, Pickaway, Ross, Pike, and Scioto, in the State of Ohio, then constructed and to be constructed, together with all the real and personal property and the income of said company, its lands, tenements, and hereditaments, rights of way, fixtures, buildings, bridges, piers, fences, structures, railways, rails, ties, locomotives, tenders, engines, cars, carriages, equipments, machinery, tools, imple-

290 ments, materials, chattles, franchises, privileges, rights, interest, income, rents, resources, reservations, benefits, investments, assets, and estate, legal and equitable, which then were owned or should thereafter be owned or acquired by said company or in any way belong or appertain to the said railroad, which said conveyance was made to the said trustee to hold in trust for the holders of certain coupon bonds of said company, to wit: one thousand bonds for $1,000 each, amounting to $1,000,000, and six hundred bonds for $500 each, amounting to $300,000, all bearing date the fifteenth day of October, A. D. 1875, and made payable on the first day of January, 1896, with interest from the first day of January, 1876, at the rate of seven per cent. per annum, payable semi-annually on the first day of the months of January and July, as is in the sixth paragraph of said petition recited.

And the said Ambos and Beatty having resigned as trustees, said railway company, by its supplemental mortgage made on the fifth day of September, 1876, substituted this defendant as trustee for the holders of said bonds, and this defendant avers that by said mortgage and supplemental mortgage this defendant, trustee as aforesaid, was given a first lien and charge upon all the line of railway of the Scioto Valley Railway Company from the city of Columbus to the city of Portsmouth, in the State of Ohio, and upon all the rolling-

stock, equipment, and other property, real and personal, of
291 the said railway company then possessed or since acquired for use in connection with the said line of railroad, and also upon the revenues, income, and earnings of the said road; and this defendant also shows that in the said mortgage it was further provided that if any default should be made in the payment when due of any money, principal or interest, secured by the said mortgage, and the same should remain due and unpaid for the space of six months, then the said railway company, upon the demand of the trustee for the then time being, should forthwith surrender to said trustee or his agent the actual possession of all and singular the property, assets, and estate in the said mortgage conveyed, together with all the records, books, papers, and accounts of said company, to hold, use, and manage and receive the rents, issues, incomes, and profits thereof for the benefit of the holders of said bonds: Provided, however, That the said trustee should not demand the surrender of the possession of said premises and property unless first requested so to do by the holders of at least one-third in amount of the outstanding bonds secured by said mortgage.

And this defendant further shows that the Scioto Valley Railway Company has published that payment was not made of the coupons maturing July 1st, 1884, and January 1st, 1885, upon the bonds secured by the said mortgage, but that the same are now outstanding and unpaid; and this defendant is informed, believes, and
292 therefore avers that some of the coupons maturing on the first day of July, 1884, and the first day of January, 1885, upon the said first-mortgage bonds were presented for payment at maturity, and payment of the same was then refused and has not since been made by the said railway company and the holders of first-mortgage bonds to the amount of $515,500 have in writing required this defendant, as trustee, in pursuance of the power in said mortgage contained to proceed to file a bill for the foreclosure of said mortgage in consequence of said default; and this defendant also shows that default was made by said railway company in the payment of the coupons maturing on the first day of July, 1885, on said first-mortgage bonds, and that, although said bonds were duly presented for payment, payment of the same was refused.

Wherefore this defendant shows that by breach of condition in said mortgage contained this defendant, trustee as aforesaid, is entitled to the possession of said line of railway from the city of Columbus to the city of Portsmouth, and all the rolling-stock, equipment, and other property, real and personal, acquired and used in connection therewith.

Fifth. This defendant admits the truth of the averments contained in the seventh, eighth, ninth, and tenth paragraphs, but charges that the rights of the mortgagees in the four mortgages in the said paragraphs mentioned are subject to the lien of the
293 said mortgage made to this defendant upon the property in the said mortgage mentioned.

Sixth. Of the matters alledged in the eleventh paragraph of the petition this defendant has no knowledge.

Seventh. This defendant further denies the claim set up by the plaintiff in the twelfth paragraph of the petition filed, that the judgement obtained by him against the Scioto Valley Railway Company, as aforesaid, is a lien upon the road and property of said Scioto Valley Railway Company, except subject to the lien of the mortgage and supplemental mortgage under which this defendant is trustee and subject to the right of this defendant to the immediate possession of the railroad and the property covered by said mortgage.

Eighth. Of the matters averred in the thirteenth paragraph of the petition this defendant has no knowledge, but it denies that the plaintiff has any equitable claim upon any funds of the Scioto Valley Railway Company which are or may be in the custody of the said P. Hayden & Co., except subject to the lien of the mortgage and supplemental mortgage under which this defendant is trustee.

Ninth. This defendant denies the right of the plaintiff to subject to the payment of his said judgement any of the property of the Scioto Valley Railway Company which is covered by the lien of the mortgage under which this defendant is trustee as against this
294 defendant's right of immediate possession of the said property.

Tenth. This defendant denies the correctness of the statements contained in the fifteenth paragraph of the petition filed in so far as anything may be therein alledged in contravention of the rights of this defendant to a first lien upon and to the immediate possession of the property described in said mortgage and supplemental mortgage under which this defendant is trustee; and this defendant denies that by reason of any of the matters in the said paragraph alledged the plaintiff has any lien, legal or equitable, upon the line of railway of the Scioto Valley Railway Company from the city of Columbus to the city of Portsmouth, in the State of Ohio, or upon the rolling-stock, equipment, or other property, real or personal, acquired and used in connection therewith, except subject to the lien of the said mortgage and supplemental mortgage under which defendant is trustee, and subject to this defendant's right of immediate possession of all the said property.

Wherefore this defendant prays that said mortgage under which this defendant is trustee may be foreclosed; that said property may under the order of the court be sold and the proceeds thereof applied to the payment of said bonds thereby secured and the interest thereon accrued, and for all proper relief in the premises.

295 STEPHEN A. CALDWELL, *Pres't*,
KITTREDGE & WILBY, *Attorneys*,
For the FIDELITY INS., TRUST, AND SAFE DEPOSIT CO.

Stephen A. Caldwell, of the city of Philadelphia, being duly affirmed according to law, doth depose and say: I am the president of the Fidelity Insurance, Trust, and Safe Deposit Company, the defendant hereinbefore named. I have read the foregoing answer, and so far as I have knowledge of the statements therein made the said statements are true, and so far as said statements are made upon the information of others I believe them to be true.

STEPHEN A. CALDWELL, *Pres't.*

Affirmed and subscribed before me this twentieth day of July, A. D. 1885.

[SEAL.] R. L. WRIGHT, JR.,
Notary Public.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } *ss:*

I, William B. Mann, prothonotary of the court of common pleas of said county, the same being a court of record, do certify that R. L. Wright, Esquire, before whom the annexed affidavit was made, was at the time of so doing a notary public for the Commonwealth of Pennsylvania, residing in the county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations
296 and to take acknowledgements, and to all whose acts as such full faith and credit are and ought to be given as well in courts *ja*dicature as elsewhere; and that I am well acquainted with the handwriting of the said notary public, and verily believe his signature thereto is genuine, and that said affidavit purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this twentieth day of July, in the year of our Lord one thousand eight hundred and eighty-five.

WILLIAM B. MANN,
Prothonotary.

297 Court of Common Pleas, Scioto County, Ohio.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY, THE CENTRAL TRUST COMPANY of New York, Samuel Thomas, The Fidelity Insurance, Trust, & Safe Deposit Company, Henry K. McHarg, The Metropolitan Trust Company of the City of New York, Pelatiah W. Huntington, John Groce, David Sinton, George Willard; John H. Halliday, Administrator of Jacob E. Kniseley, Deceased; Elizabeth Laudram, Administratrix of John Laudram, Deceased; Charles E James, Administrator of George Galbraith, Deceased; Martha E Patten, P. Hayden & Co., and George W. A. Clough, Defendants.

To the honorable the judges of the court of common pleas of Scioto county, in the State of Ohio:

The petition of the Fidelity Insurance, Trust, and Safe Deposit Company respectfully shows:

298 First. That the above-entitled suit was begun in the court of common pleas of Scioto county, in the State of Ohio, on the twenty-ninth day of May, 1885.

Second. That at the time said suit was begun, and at the present time, the plaintiff, Collis P. Huntington, was and is a citizen and resident of the State of New York; and the defendant, The Scioto Valley Railway Company, was and is a corporation organized under the laws of the State of Ohio and a citizen of said State of Ohio;

and this petitioner, The Fidelity Insurance, Trust, and Safe Deposit Company, was and is a corporation organized under the laws of the State of Pennsylvania and a citizen thereof; and the defendants, The Central Trust Company of New York and The Metropolitan Trust Company of the City of New York, were and are corporations organized under the laws of the State of New York and citizens of said State of New York; and the defendants, Samuel Thomas and Henry K. McHarg, were and are citizens of the State of New York; and the defendants, Pelatiah W. Huntington, John Groce, David Sinton, George Willard; John Holliday, administrator of Jacob E. Knisely, deceased; Elizabeth Laudram, administratrix of John Laudram, deceased; Charles E. James, administrator of George
299 Galbraith, deceased; Martha E. Patten, and George W. A. Clough, were and are citizens of the State of Ohio; and the defendant, P. Hayden & Co., is a corporation organized under the laws of the State of Ohio and a citizen of said State of Ohio.

This petitioner further shows that in the above-entitled suit there is a controversy which is wholly between citizens of different States, and which can be fully determined between them, the said controversy being between your petitioner, a citizen of the State of Pennsylvania, on the one hand, and the said Collis P. Huntington, a citizen of the State of New York, and the Scioto Valley Railway Company, a citizen of the State of Ohio, and the Central Trust Company of New York, Samuel Thomas, Henry K. McHarg, the Metropolitan Trust Company of the City of New York, citizen of the State of New York, and Pelatiah W. Huntington, John Groce, David Sinton, George Willard, John H. Holliday, administrator of Jacob E. Knisely, deceased; Elizabeth Laudram, administratrix of John Laudram, deceased; Charles E. James, administrator of George Galbraith, deceased; Martha E. Patten, P. Hayden & Co., and George W. A. Clough, citizens of the State of Ohio, on the other hand.

That the matter in dispute in said controversy exceed- the sum or value of $500, exclusive of cost, and the petitioners herewith files
300 a bond, with good and sufficient surety, for the entry by it in the circuit court of the United States for the southern district of Ohio, wherein said suit is pending, on the first day of the next session of said court, a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, as provided by the statute of the United States.

Wherefore this petitioner prays this honorable court that said suit be removed into the circuit court of the United States for the southern district of Ohio, and that this court proceed no further in the premises.

STEPHEN A. CALDWELL, *Pres't.*
KITTREDGE & WILBY, *Attorneys.*
THE FIDELITY INSURANCE, TRUST, AND SAFE DEPOSIT COMPANY.

Stephen A. Caldwell, being duly sworn — affirmed according to law, doth depose and say: I am the president of the Fidelity Insur-

ance, Trust, and Safe Deposit Company, the petitioner hereinbefore named. I have read the foregoing petition, and the statements therein contained are just and true, as I verily believe.

STEPHEN A. CALDWELL, *Pres't.*

Affirmed and subscribed before me this twentieth day of July, 1885.

[L. S.] R. L. WRIGHT, JR.,
Notary Public.

301 STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

I, William B. Mann, prothonotary of the court of common pleas of said county, the same being a court of record, do certify that R. L. Wright, Jr., Esquire, before whom the annexed affidavit was made, was at the time of so doing a notary public for the Commonwealth of Pennsylvania, residing in the county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgements, &c., and to all whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that I am well acquainted with the handwriting of the said notary public, and verily believe his signature thereto is genuine, and that said affidavit purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony — I have hereunto set my hand and affixed the seal of said court this 20th day of July, in the year of our Lord one thousand eight hundred and eighty-five.

[L. S.] WILLIAM B. MANN,
Prothonotary.

302 1885, July 27th.—Affidavit of John C. Bullitt filed, as follows:

Court of Common Pleas, Scioto County, Ohio.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY *et al.*, Defendants.

COUNTY OF PHILADELPHIA, } ss:
State of Pennsylvania, }

John C. Bullitt, being duly sworn according to law, doth depose and say: I am the owner of real estate situated in the city of Columbus, in the State of Ohio, the clear value of which is at least the sum of ($10,000) ten thousand dollars.

JOHN C. BULLITT.

Sworn and subscribed to before me this 1st day of July, 1885.

[L. S.] WALTER C. RODMAN,
Notary Public.

1885, July 27th.—Affidavit of E. W. Kittredge filed as follows, to wit:

SCIOTO COUNTY, *State of Ohio*:

Common Pleas Court.

COLLIS P. HUNTINGTON, Plaintiff,
against
THE SCIOTO VALLEY RAILWAY COMPANY *et al.*, Defendants.

303 STATE OF OHIO, }
Hamilton County, } *ss*:

E. W. Kittredge, being duly sworn according to law, doth depose and say: "I am the owner of real estate situated in the city of Cincinnati, in the State of Ohio, and unincumbered, the clear value of which is at least the sum of fifteen thousand dollars ($15,000.00)." And further affiant sayeth not.

E. W. KITTREDGE.

Sworn to before me and subscribed in my presence this 22nd day of July, A. D. 1885.

J. HARTWELL CARBELL,
Notary Public in & for Hamilton County, Ohio.

304 1885, July 27th.—Bond for removal to the U. S. circuit court, southern dist. of Ohio, filed as follows, to wit:

Know all men by these presents that we, the Fidelity Insurance, Trust, and Safe Deposit Company of the City of Philadelphia, John C. Bullitt, and E. W. Kittredge, are jointly and severally held and firmly bound unto Collis P. Huntington in the penal sum of five hundred dollars; for which sum, well and truly to be paid unto the said Collis P. Huntington, his heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals this 20th day of July, one thousand eight hundred and eighty-five.

The condition of this obligation is such that if the said Fidelity Insurance, Trust, and Safe Deposit Company, in a suit now pending in the — common pleas of Scioto county, in the State of Ohio, in which Collis P. Huntington is plaintiff and The Scioto Valley Railway Company, The Central Trust Company of New York, Samuel Thomas, The Fidelity Insurance, Trust, and Safe Deposit Company, Henry K. McHarg, The Metropolitan Trust Company of the City of New York, Pelatiah W. Huntington, John Groce, David Sinton, George Willard; John Holliday, administrator of Jacob E. Knisely, deceased; Elizabeth Laudram, administratrix of John Laudram,
305 deceased; Charles E. James, administrator of George Galbraith, deceased; Martha E. Patten, P. Hayden & Co., and George W. A. Clough, defendants, shall, on the first day of the next session or term of the circuit court of the United States for the southern district of Ohio, enter a copy of the record in said suit and shall enter the appearance of said Fidelity Insurance, Trust, and Safe Deposit

Company in said circuit court of the United States and pay all costs that may be awarded against it by said circuit court if such court shall hold that said suit was wrongfully or improperly removed thereto from said State court, then this obligation to be void, and otherwise to remain in full force and effect.

STEPHEN A. CALDWELL, *Pres't.*
Attest: [L. S.] R. PATTERSON, *Sec'y.*
JOHN C. BULLITT. [SEAL.]
E. W. KITTREDGE. [SEAL.]

Signed and delivered in presence of—
ALEX. PUNES.
R. A. WILKINSON.

Witnesses as to John C. Bullitt:
RICHARD C. DALE.
E. F. HASTE.

Witnesses as to E. W. Kittredge:
JOSEPH WILBY.
J. HARTWELL CABELL.

306 In witness whereof I have hereunto set my hand and the seal of said court of common pleas of Scioto county, Ohio, at Portsmouth, this 4th day of August, A. D. 1885.

[L. S.] J. H. SIMMONS, *Clerk.*

[Folios 307 and 308 omitted.]

309 And afterward, to wit, but on the day and year last aforesaid, came the said complainant herein aforesaid, the said Collis P. Huntington, by W. A. Hutchins, Harrison, Olds and Marsh, and Ramsey, Maxwell & Matthews, his solicitors, and filed in the said the clerk's office of the court aforesaid in this cause his certain motion herein, and which said motion so as aforesaid filed is clothed in the words and figures as follows, to wit:

Motion to Remand.

Circuit Court of the United States for the Southern District of the State of Ohio.

COLLIS P. HUNTINGTON, Plaintiff,
vs.
THE SCIOTO VALLEY RAILWAY COMPANY, THE CENTRAL TRUST COMPANY of New York, Samuel Thomas, The Fidelity Insurance, Trust, and Safe Deposit Company, Henry K. McHarg, The Metropolitan Trust Company of the City of New York, Peletiah W. Huntington, John Groce, David Sinton, George Willard; John H. Holliday, Administrator of Jacob E. Knisley, Deceased; Elizabeth Laudram, Administratrix of John Laudram, Deceased; Charles E. James, Administrator of George Galbraith, Deceased; Martha E. Patton, P. Hayden & Co., and George W. A. Clough, Defendants.

310 The above-named plaintiff, Collis P. Huntington, now comes

and, expressly limiting his appearance in this court for the sole purpose of making this motion, moves this court to remand this suit to the court of common pleas of Scioto county, State of Ohio, wherein the same was commenced and is now pending, and for cause alleges that this court has no jurisdiction of this suit.

(Signed) W. A. HUTCHINS,
HARRISON, OLDS & MARSH,
RAMSEY, MAXWELL & MATTHEWS,
Att'ys for Plaintiff.

[Folios 311 to 360 omitted.]

361 And afterward, to wit, on the 21st day of November, in the year last aforesaid, an entry was made upon the journal of the court aforesaid in this cause, and which said entry so as aforesaid made is clothed in the words and figures as follows, to wit:

W, 264. *Journal Entry.*

COLLIS P. HUNTINGTON
vs.
THE SCIOTO VALLEY RAILWAY COMPANY *et al.* } 3805. Chancery.

This cause came on for hearing upon the motion of complainant to remand this cause to the common pleas court of Scioto county, Ohio, and was argued by counsel, and the court, being fully advised in the premises, grants said motion. It is therefore ordered that this cause be, and the same hereby is, remanded to said common pleas court of Scioto county, Ohio; and it is further ordered that the Fidelity Insurance, Trust, and Safe Deposit Company pay all costs of this proceeding in this court; to which ruling of the court in granting said motion counsel for the Fidelity Insurance, Trust, and Safe Deposit Company except and pray an appeal to the Supreme Court of the United States, which appeal is granted and appeal bond fixed at the sum of one thousand ($1,000) dollars.

362 And afterward, to wit, on the 28th day of November, came the said defendant, the said The Fidelity Insurance, Trust, and Safe Deposit Company, by its said solicitors, and filed in the said the clerk's office of the court aforesaid in this cause its certain appeal bond, and which said appeal bond so as aforesaid filed is clothed in the words and figures as follows, to wit:

Appeal Bond.

Circuit Court of the United States, Western Division.

COLLIS P. HUNTINGTON
vs.
THE SCIOTO VALLEY RAILWAY COMPANY *et al.*

Know all men by these presents that we, The Fidelity Insurance, Trust, and Safe Deposit Company, as principal, and William H. Doane, are held and firmly bound unto Collis P. Huntington in the

sum of one thousand dollars, to be paid to the said Collis P. Huntington, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals. Dated this 28th day of November, 1885.

Whereas the above-named The Fidelity Insurance, Trust,
363 and Safe Deposit Company has taken out an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now therefore the condition of this obligation is such that if the above-named The Fidelity Insurance, Trust, and Safe Deposit Company shall prosecute its said appeal to effect and answer all costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

(Signed) WILLIAM H. DOANE. [SEAL.]
(Signed) RICHARD FOLSOM. [SEAL.]

Sealed and delivered in presence of—
(Signed) ROBERT C. GEORGI.
(Signed) CHARLES R. NEVIN.

The above security is approved.

GEORGE R. SAGE,
District Judge of the United States, S. D. of Ohio,
Sitting as Circuit Judge in Above-entitled Cause.

Oath of Sureties Attached.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, William H. Doane, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth twenty-five thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

(Signed) WILLIAM H. DOANE.

364 Sworn to before me the 28 day of November, 1885.

[SEAL.] ROBERT C. GEORGI,
Dep. Clerk U. S. Circuit Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Richard Folsom, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth two thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

RICHARD FOLSOM.

Sworn to before me the 28th day of November, 1885.

[SEAL.] C. R. NEVIN,
Dep. Clerk U. S. Circuit Court, S. D. O.

And afterward, to wit, but on the day and year last aforesaid, was issued out of the said the clerk's office of the court aforesaid in this cause our certain writ of citation herein, and which said citation, with the proceedings of the marshal of the district aforesaid serving the same endorsed thereon as returned into the said the clerk's office of the court aforesaid, by the said marshal aforesaid, is hereto attached as follows, viz:

365 *Citation.*

THE UNITED STATES OF AMERICA, *ss*:

To Collis P. Huntington, Greeting:

Whereas The Fidelity Insurance, Trust, and Safe Deposit Company has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Ohio made in favor of you, the said Collis P. Huntington, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Cincinnati, in the sixth circuit, this 28th day of November, in the year of our Lord one thousand eight hundred and eighty-five.

GEORGE R. SAGE,
U. S. District Judge, Southern District of Ohio,
Sitting as Circuit Judge in Above-entitled Cause.

[Endorsed:] United States circuit court, western division. No. 3805. C. P. Huntington *vs.* The Scioto Valley R. Co. *et al.* Citation to appellee. Filed December 22d, 1885. B. R. Cowen, clerk.

366 We acknowledge service of the within writ for Collis P. Huntington.

Cincinnati, Dec. 22, '85.

RAMSEY, MAXWELL & MATTHEWS,
Attorneys.

Received this writ at Cincinnati, Ohio, on the 19th day of December, 1885, and on the 22d day of December, 1885, I served the within-named Collis P. Huntington by delivering to Messrs. Ramsey, Maxwell and Matthews, his attorneys, a true copy of this writ, the said Ramsey, Maxwell and Matthews acknowledging the service of the same by endorsement hereon.

H. C. UMER,
U. S. Marshal, S. D. O.
By C. A. COSTELLO, *Dep't.*

1 service	2 00
1 copy	50
1 mile	06
	$2 56

367 UNITED STATES OF AMERICA,
Western Division of the Southern District of Ohio:

I, B. R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the record and proceedings of the court aforesaid in the cause therein named as the same appears of record and on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court aforesaid, at Cincinnati, this 23rd day of December, in the year of our Lord one thousand eight hundred and eighty-five, and in the one hundred and tenth year of the Independence of the United States of America.

[Seal of the Circuit Court, South'n Dist. of Ohio.]

B. R. COWEN,
Clerk U. S. Circuit Court, S. D. Ohio,
By ROB'T C. GEORGI, *Deputy.*

Endorsed on cover: S. Ohio C. C. U. S. No. 1236. The Fidelity Insurance, Trust, and Safe Deposit Company, appellant, *vs.* Collis P. Huntington. Filed December 30th, 1885.

117-280

Supreme Court of the United States.

The Fidelity Insurance, Trust and Safe Deposit Company, Appellant,	October Term, 1885.
vs.	No. 1236.
Collis P. Huntington.	

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

MOTION TO ADVANCE UNDER RULE 32.

And now, March 1st, 1886, the Fidelity Insurance, Trust and Safe Deposit Company, appellants, move to advance the hearing of the above-entitled cause under Rule 32.

STATEMENT OF THE CASE.

Collis P. Huntington, a citizen of the State of New York, filed a bill of complaint in the Common Pleas of Scioto county, in the State of Ohio, against the Scioto Valley Railway Company, the Fidelity Insurance, Trust and Safe Deposit Company and others.

The Fidelity Insurance, Trust and Safe Deposit Company, a citizen of the State of Pennsylvania, filed a petition to re-

move the cause to the Circuit Court of the United States, for the Southern District of Ohio, under the act of March 3d, 1875.

A transcript of the record having been filed in the Federal court, a motion to remand the cause to the State court was made in behalf of Collis P. Huntington, the plaintiff below.

After argument, the motion to remand was granted, and the Fidelity Insurance, Trust and Safe Deposit Company took this appeal under section 5 of the act of March 3d, 1875.

As provided by Rule 32, this motion to advance is made.

SAMUEL DICKSON,
Attorney for the Fidelity Insurance, Trust and Safe Deposit Company.

117-280

No. 1236. *Of October Sessions, 1885.*

In the Supreme Court of the United States.

Appeal of the Fidelity Insurance, Trust and Safe Deposit Company from a Decree of the Circuit Court of the United States for the Southern District of Ohio.

PAPER-BOOK OF THE APPELLANTS.

RICHARD C. DALE,
E. W. KITTREDGE,
JOHN C. BULLITT,
For the Appellants.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

Of October Sessions, 1885. No. 1236.

APPEAL OF THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY FROM A DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

PAPER-BOOK OF THE APPELLANTS.

STATEMENT OF CASE.

The cause comes before the court upon an appeal from an order remanding the proceeding to the Common Pleas of Scioto county.

On May 29th, 1885, C. P. Huntington filed a bill in equity in the Common Pleas of Scioto county, naming as defendants the Scioto Valley Railroad Company, the Central Trust Company of New York, Samuel Thomas, the Fidelity Company of Philadelphia, Henry K. McHarg, the Metropolitan Trust Company, P. W. Huntington, John Groce, David Sinten, George Willard, John H. Halliday, administrator, Elizabeth Landren, administratrix, Charles E. Jannes, Martha E. Patton, P. Hayden & Co., George W. A. Clough.

The averments of this bill were as follows :—

1. Of the corporate existence of the railroad company defendant.
2. Of the corporate existence of the several trust companies defendant.
3. Of the recovery by Huntington of a judgment against the railroad company in the Common Pleas of Lawrence county, for $637,305.67, on May 31st, 1885.
4. Of the issue of execution.
5. Of the inability to levy upon sufficient property to satisfy the plaintiff's claim.
6. The execution of the first mortgage, dated October 15th, 1875.
7. The execution of the second mortgage, dated February 19th, 1875.
8. The execution of the consolidated mortgage, dated September 13th, 1880.
9. The execution of the mortgage to McHarg, dated May 1st, 1881.
10. The execution of the mortgage to the Metropolitan Trust Company, dated February 1st, 1883.
11. The averment of special liens upon detached pieces of property as follows :—

    Of defendant Groce on property in Circleville.

    Of defendant P. W. Huntington on property in Columbus.

    Of defendant Sinten on property in Chillicothe.

    Of defendant Villard on property in Petersburgh.

    Of defendants Halliday and Patten under a judgment in Scioto county.

    Of defendants Landren and Jannes under a judgment in Ross county.

    Of the defendant Clough under a judgment in Pike county.
12. An averment of the importance of the sale of the railroad as an entirety, and the general insolvency of the Scioto Valley Railroad Company.
13. An averment that P. Hayden & Co. were bankers, and

that there was a balance in their hands to the credit of the company.

14. An averment of plaintiff's right to subject the interest of the railroad company to execution and sale.

15. The consideration for said judgment as recorded by said plaintiff against said Scioto Valley Railroad, was the supplying and laying steel rails and supplying locomotives and cars to said railroad company, and bettering and improving the said railroad and its equipment, and in advances of money to be used, and which were used for the purposes aforesaid, and all said supplies and moneys went into the betterment of said property and thereby of the security of all holders of liens thereon, and said plaintiff is entitled to an equitable lien on said railroad and eqnipment and property, and upon any fund that may be created from the use or operation or sale thereof for all moneys so used, advanced, and applied.

The plaintiff prayed for general injunction; a receiver; that the income of the road might be subject to the payment of plaintiff's judgment; that money in Hayden Bank should be applied to the same purpose; that plaintiff's equitable lien should be enforced, and that the assets and liabilities of the defendant railroad company should be marshaled.

The answer of the Fidelity Insurance, Trust and Safe Deposit Company, *inter alia*, stated the terms of the first mortgage, under which said company was trustee, and showed that by breach of condition in said mortgage contained, the Fidelity Company, as trustee, was entitled to the possession of the line of railway from Columbus to Portsmouth and the property used in connection therewith, and asserting a first lien upon the mortgaged estate as against the plaintiff and the several mortgagees claiming under subsequent mortgages and creditors of the railway company, and praying that the rights of the Fidelity Company as mortgagee should be specifically enforced.

The Fidelity Company, after entering its appearance and filing its answer, filed a petition for the removal of the cause

from the Common Pleas of Scioto county to the Circuit Court of the United States, Southern District of Ohio, with a proper bond as required by statute. Upon the motion of the plaintiff, the Circuit Court, after argument, remanded the cause to the State Court.

It thus appears that in the suit there is a separable controversy in which the Fidelity Company, a citizen of Pennsylvania, is on one side, and the railway company and subsequent mortgagees and creditors, citizens of Ohio and New York, are on the other.

In this controversy, the Fidelity Company, as against the remaining parties, asserts the right to enter upon and take possession of the mortgaged premises, and to enforce as a first lien against the same the mortgage under which the Fidelity Company is trustee.

BRIEF OF ARGUMENT.

Under the first clause of section 2 of the act of 3d March, 1875, only those suits could be removed from the State to the Federal courts where the controversy in such suit was one where the real parties in interest on one side were all of a different citizenship from the parties on the other side. In the second clause of the same section is found this provision:—

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States for the proper district."

To properly appreciate the force of this clause, the difference in the course of proceedings at law and in equity must be borne in mind. In actions at common law, the cause of action must be single, or at least of the same general nature and between the same parties, and capable of being included in one judgment, and although since the statutes authorizing duplicity in pleading, several defenses may be raised, this has

not destroyed the general singleness of the issue, and the unity of the judgment to be entered. In some proceedings in equity also the issue and prayer for relief is single, but in many other proceedings, and the case before the court is a good example of this class, a bill is filed against numerous defendants with whom there is no common issue, but who, having an interest in the property which is the subject-matter of the litigation, are joined in order that while the hand of the chancellor was on the property, the equities of all parties interested in it may be worked out; and to accomplish this result, all questions arising between the parties may be determined, and a decree entered which as to one party may dispose of one issue arising between certain of the parties and give appropriate relief, and as to other issues arising between other parties dispose of them and give appropriate relief.

The present case is a good illustration of this class of cases. The subject-matter of the litigation is the Scioto Valley Railroad. The primary parties are C. P. Huntington and the Scioto Valley Railway Company. Huntington having obtained judgment against the railway company, filed a bill to subject its property to the lien of the judgment, and to sale thereunder. This property being subject to mortgages the mortgagees are made defendants, and a prayer is asked for as against them that the property be sold freed from the lien of the mortgages, and that the court then make distribution of the proceeds as the equities of the parties may be shown therein.

The first controversy is between the plaintiff Huntington, and the Scioto Valley Railway Company, the issue being whether the plaintiff is entitled as against the railway company to bring the railway and other property to sale.

The second controversy, or more properly speaking the second series of controversies, is between the plaintiff Huntington and the several incumbrancers, involving the right of the plaintiff to sell the property discharged of these incumbrances or any of them, and it is to be borne in mind that while the same rule may apply to all these incumbrances, the controversy as to each incumbrancer is a separate controversy,

the several mortgagees and judgment creditors not having any privity the one with the other.

The third controversy arises upon the question of priority, and upon this point, the Fidelity Insurance, Trust and Safe Deposit Company, trustees under the first mortgage, claim that under their mortgage they have a first lien upon the property, which lien both as to the property and the proceeds of any sale which may be made, they assert against all the other parties to the litigation, and in particular against the plaintiff Huntington, who asserts a prior equitable lien upon the property in consequence of the advances made by him to the railway company, which are the basis of the judgment, being used for betterments upon the property.

If all the parties to the litigation are regarded as interested in contesting this claim of the Fidelity Insurance, Trust and Safe Deposit Company, then the cause is removable, because the controversy is between the Fidelity Company, a citizen of Pennsylvania, on one side and the railway company, the other mortgagees and judgment directors, all of whom are citizens of New York and Ohio, on the other side.

If, however, the proper parties to this controversy are limited to the Fidelity Company as trustee under the first mortgage, the Scioto Valley Railway Company, and C. P. Huntington, then the controversy is between a citizen of Pennsylvania on one side and a citizen of New York and a citizen of Ohio on the other, and is removable under the second clause of the act.

This view of the act is very clearly brought out in the case of Boyd *vs.* Gill, 19 Fed. Rep., 145.

A bill was filed against several trustees for the fraudulent misappropriation of trust funds, and involved a joint and several accounting by the trustees; it was held that if one of the defendants was a non-resident the case was removable. Judge Wallace in delivering the opinion fully recognized the reasoning in the line of cases where actions against joint *tort-feasors* are held non-separable, but then said :—

" It remains to consider whether, under the bill here, which seeks a decree that the defendants account severally concern-

ing the gains and profits received by each through the fraudulent acts complained of, there is not a controversy which is separate as between the plaintiff and each defendant, and which can be fully determined as between them. If the plaintiff has elected to pursue each defendant separately, and the cause of action disclosed by the bill justifies him in doing so, it would seem that the suit presents a separate controversy as to that defendant, notwithstanding there is also a controversy between the plaintiff and all the defendants jointly. If this separate controversy can be fully determined between the plaintiff and defendant without the presence of the other defendants, the language of the Removal Act is satisfied. That it can be thus determined has already been shown, because the other trustees are not necessary parties to a suit brought against one for a fraudulent breach of trust. There is, therefore, a distinct controversy here between the plaintiff and each defendant. Some of the transactions assailed by the bill are not joint transactions on the part of the defendants. All of the defendants may not be liable to the same extent. The prayer as to this branch of the bill is against each defendant for a several accounting, and that is only necessary upon the theory that some of them are liable for a different amount than others.

"It is no answer to the suggestion that the suit presents a separate and distinct controversy as between the plaintiff and each defendant to assert that the decree obtained will be a single decree as to all the defendants. The same thing may be said of every decree in suits in equity, and could have been said in Barney *vs.* Latham. For these reasons the actions were properly removed."

In case of Capital City Bank *vs.* Hodgin, 22 Fed. Rep., 209, a citizen of Iowa mortgaged a stock of goods to an Iowa corporation. The same goods were claimed by a citizen of Ohio under another chattel mortgage. The Iowa corporation filed a petition in the State Court alleging that the mortgage to the citizen of Ohio was fraudulent. It was held that the citizen of Ohio could remove the cause, as in it was involved a separate controversy between citizens of different States.

In deciding the case the court applied the rule stated in Frazer *vs.* Jennison, 106 U. S., 191, that in order to justify a removal, "The case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."

In Wabash R. R. Co. *vs.* Central Trust Co., 23 Fed. Rep., 513, Brewer, Circuit Judge, said:—

"That the State Court had jurisdiction of that suit is to my mind indisputable, and that it was a case which was removable to this court is equally clear, although some of the parties defendant, one at least, is a citizen of the same State with the complainant, the Central Trust Company, for there is a primary, separable, independent controversy between the Central Trust Company, a citizen of New York, and the Wabash Railroad, a citizen of the State of Missouri, a controversy in respect to the mortgage given by the one to the other. Where there is such a separable, independent controversy between citizens of two States pending in a suit in the State Court, either one of the parties to that controversy may file his petition and bond to remove the entire suit to this court, although thereby they bring into this court, if you please, another controversy between citizens of the same State. That is the clear language and scope of the decision in Barney against Latham, 103 U. S., 205; and followed by other causes. In other words, the Supreme Court there affirmed, as was well said yesterday, the doctrine that where there is in a suit a distinct, separable, independent controversy between citizens of two States, it is a case which may be removed into the Federal courts, and the Federal courts can take jurisdiction of it, and of the whole of it. In that respect, as said in a late opinion of the Supreme Court, the jurisdiction of the Circuit Court is larger than that which can be obtained by an action brought originally here. Hence that case—the last suit—is properly in this court; and that this court has jurisdiction of it, with all that is involved, we have no question.

"In the foreclosure of a mortgage there is a certain sense in which you may say that the only indispensable parties are the mortgagor and the mortgagee. You can foreclose that mortgage and divest the mortgagor of all his interest, and transfer it by sale into the mortgagee, or any other purchaser, and that without the presence of other incumbrancers as parties. And yet we all know that there are certainly proper parties, or may be proper parties, other than the mortgagor and the mortgagee. Subsequent mortgagees, of course, are proper parties in order to cut off any equity of redemption; and while it is laid down in the Supreme Court of the United States that an independent controversy between the mortgagor and a third party, one involving the question of paramount title, is not to be litigated in a foreclosure suit, yet all those things which simply involve matters of lien on the property, whether prior or subsequent, may, as a general rule, properly be considered in such a suit."

To the same effect is Girardey *vs.* Moore, 3 Wood's C. C. Rep., 397, where the history of the Removal Acts is fully considered by Mr. Justice Bradley.

But the best method of establishing the truth of a legal proposition is by the examination of authorities which, until carefully read, might seem to be antagonistic. Upon such an examination of the cases decided in this court where the right of removal has been denied, it will be seen that they were actions at law where the cause of action was single, although several defendants were jointly liable, or else proceedings in equity involving the determination of a single controversy, though in the determination of that single controversy there were several defendants necessary parties.

In Pirie *vs.* Toedt, 115 U. S., 41, the action was in tort for a malicious prosecution, in which the defendants were charged with joining and confederating together to oppress the plaintiff. It is true that the defendants answered separately, and by their answers raised distinct issues. This, however, did not make a separate controversy, because the cause of action was single and inseparable.

Crump *vs.* Thurber, 115 U. S., 56, was in equity. A bill was filed by a citizen of Kentucky against a corporation of the same State and W., a citizen of the same State, and a citizen of New York, to compel the transfer by the corporation to the plaintiff of stock standing in the name of W., subclaimed by a citizen of New York. It was held that there was no separate controversy within the meaning of the statute between the plaintiff and the citizen of New York. The controversy as raised upon the pleadings was between the plaintiff and the corporation, both of whom had the same citizenship.

In Louisville & Nashville R. R. Co. *vs.* Ide, 114 U. S., 52, it was decided that the filing of separate answers tendering separate issues for trial by several defendants sued jointly in a State court on a joint cause of action does not divide the suit into separate controversies so as to make it removable into the Circuit Court of the United States, under the last clause of section 2, act of March 3d, 1875.

In this case, the plaintiff jointly sued the several defendants, who were connecting railroads doing business as the "White Line Central Transit Company," asserting a joint liability as common carriers under a joint contract. Under these circumstances the existence of separate defenses did not make the controversy a separable controversy within the meaning of the act.

The same point was decided in St. Louis R. W. Co. *vs.* Wilson, 114 U. S., 60. In that case a bill was filed to compel a corporation—a Missouri corporation—to transfer to the plaintiff, a citizen of Missouri, stock standing in the name of third parties, citizens of New York.

In this case the corporation and third parties were both necessary defendants, and the corporation being of the same citizenship as the plaintiff, the cause was remanded.

In the opinion in this case, Mr. Chief Justice Waite recognized that the separate answer of a defendant may introduce a separate controversy, which may be made the basis of a removal.

Central R. R. Co. of N. J. *vs.* Mills, 113 U. S., 249, was a bill filed by New Jersey stockholders against a New Jersey rail-

road company to enjoin a lease of the New Jersey Railroad to a Pennsylvania corporation. Under these circumstances, the absence of Federal jurisdiction was manifest.

In Thayer *vs.* Life Association, 112 U. S., 717, it was held that a trustee being a necessary party defendant and of the same citizenship as the *cestui que trust* complainant, a cause could not be removed although one of the parties defendant was of different citizenship from the complainant.

Ayres *vs.* Wiswell, 112 U. S., 187, was a proceeding instituted in a State court to foreclose a mortgage, in which the mortgagees were of the same citizenship with the mortgagors. Other defendants of a different citizenship were added, but the relief sought against them was incidental to the subject-matter of the main controversy.

This case is therefore distinguishable from the case before the court, where the controversy between the Fidelity Company and the other parties, which, although arising in the progress of the cause instituted by the complainant arising out of an independent contract, to wit, the mortgage between the railway company and the Fidelity Company, and is of the same general character as the question arising in the Removal cases, 100 U. S., 457.

Indeed the circumstances of this case bring it directly within the principles stated in Frazer *vs.* Jennison, 106 U. S., 191, cited with approval in Ayres *vs.* Wiswell, 112 U. S., at page 192.

"The rule is now well established that this clause in the section refers only to suits where there exists a separate and distinct cause of action, on which a separate and distinct suit might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other."

Winchester *vs.* Loud, 108 U. S., 130, was the case of a bill filed by a *cestui que trust* against a trustee, in which parties defendant whose presence was essential to the determination of the questions involved in the administration of the trust were of the same citizenship as the complainant.

In Shainwald *vs.* Lewis, 108 U. S., 158, the bill was filed for

the dissolution of a partnership, and in the arrangement of the real parties to the controversy on the several sides, citizens of the same State were found on opposite sides.

In Hyde *vs.* Ruble, 104 U. S., 407, one of the defendants was of the same citizenship as the plaintiffs. The action was upon a contract charging the defendants as partners. The defendant whose citizenship was the same as that of the plaintiff denied partnership and also performance of the contract. The cause was remanded.

In Blake *vs.* McKim, 103 U. S., 336, the suit was against three executors, one of the same citizenship as plaintiff. It was held indivisible.

In Barney *vs.* Latham, 103 U. S., 205, a bill was filed by a citizen of Minnesota against citizens of New York and Massachusetts and a corporation organized under the laws of Minnesota. The Minnesota corporation was not a party to the relief prayed for as against the New York and Minnesota defendants. The court said: "But the suit as distinctly presents another and entirely separate controversy as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found upon an accounting to be due from them upon sales prior to the conveyance from the railroad company. With that controversy the land company as a corporation has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiff and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens respectively of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin, and Massachusetts.

And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin, and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal Court.

"It may be suggested that if the complaint has united causes of action, which, under the settled rules of pleading, need not, or should not, have been united in one suit, the removal ought not to carry into the Federal court any controversy except that which is wholly between citizens of different States, leaving for the determination of the State court the controversy between the plaintiffs and the land company. We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin and Massachusetts. Whether those defendants and the land company were not *proper* parties to the suit we do not now decide. We are not advised that any such question was passed upon in the court below. It was not discussed here, and we are not disposed to conclude its determination by the court of original jurisdiction, when it is therein presented in proper form. A defendant may be a proper, but not an indispensable, party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendants. Consistently with established rules of pleading he may be governed often by considerations of mere convenience; and it may be that there was, or is, such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced by it—at least, in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder."

It was urged in argument and observed by the court below in the decision upon the motion to remand, that if the plaintiff succeeded in establishing the priority of its lien over that of the first mortgage upon the facts stated in the averment, No. 15 of his bill, and if the railroad sold for enough to pay the plaintiff and the Fidelity Company in full, that the subsequent lienholders would turn out to be the only parties who

would be necessarily *interested* in resisting the plaintiff's claim of priority as against the lien of the first mortgage to the Fidelity Company, and that this showed that the controversy in respect to the priority of liens was not a separable controversy between the plaintiff and the Fidelity Company. It might be answered that if upon the sale of the property it should turn out that it did not produce sufficient to satisfy the lien of the first mortgage, the controversy as to priority between the plaintiff and the Fidelity Company would be one in which subsequent lienholders would have no interest whatever. It seems to us that this shows that the nature of the controversy, as to whether it is separable or otherwise, between a citizen of one State and the citizens of another, cannot be made to depend upon a contingency that is to be determined by the results of a litigation, but that it must depend, as indicated in the opinion in Barney *vs.* Latham, upon the nature of the question which is at issue between the plaintiff and the defendant, the Fidelity Company; and that it is not affected by the fact that the other parties may have an *interest* in the determination of that question, which rendered them proper although no necessary parties. Can there be any doubt that the plaintiff could have filed his bill against the Railroad Company and the Fidelity Company, and have had this question tried and definitely settled as between him and the Fidelity Company before it was found necessary to bring in the other defendants in order to have their rights determined and the property sold upon the foreclosure of the mortgage of the Fidelity Company, free of all incumbrances?

The Fidelity Company also claims, as has been shown by its answer, that it was entitled to the possession of the line of railroad from Columbus to Portsmouth, and the property used in connection therewith as against all the parties to this litigation, whose citizenship is of other States than that of the Fidelity Company. Whatever controversy formed the subject-matter of the litigation, which the Fidelity Company is a necessary and proper party to, is a controversy between it and citizens of other States; and the subject-matter of this controversy does not include that portion of the line of the Scioto

Valley Railway extending from Portsmouth to a point opposite Ashland, in the State of Kentucky, a distance of thirty-two miles, and it does not include the funds alleged by the petition to be in the possession of P. Hayden & Co., bankers, and it may not include all the detached pieces of property included in the eleventh averment of the bill. The priority of the lien of the Fidelity Company upon the line of the Scioto Valley Railway from Columbus to Portsmouth is thus clearly separable as to the subject-matter of the litigation, from whatever controversy there may be between the parties in the case in respect to all the other property included in the bill, in respect to which relief is sought by the plaintiff. The Fidelity Company asserts the validity and priority of its lien, and its right of possession thereunder, against all the other parties to the litigation. Upon that averment arises the only controversy that it can possibly have with any of these parties, and as to that controversy, it is necessarily on our side, and all the other parties, being citizens of New York and Ohio, are on the other side.

We therefore respectfully submit that the court below erred in remanding the case to the State court.

RICHARD C. DALE,
E. W. KITTREDGE,
JOHN C. BULLITT,
For the Appellants.

Supreme Court U.S.
FILED
FEB 27 1886
JAMES H. McKENNEY,
CLERK.

No. 1236. OCTOBER TERM, 1885.

Supreme Court of the United States.

Appeal of the Fidelity Insurance, Trust and Safe Deposit Company from a Decree of the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR THE APPELLEES.

BY

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The case does not fall within either class of cases provided for by Sec. 639 of Rev. Stat.: For the suit is not by a citizen of the State of Ohio, nor, so far as concerns the plaintiff below, who is the appellee, and the trustee of the first mortgage, who is the appellant, is it between a citizen of the State in which it is brought and a citizen of another State.

Does it fall within the act of 1875, 18 Stat. 470, which provides, "That any suit * * in which there shall be a controversy between citizens of different States, * * either party may remove said suit * * and when in any suit mentioned * * there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit."

The defendants below, the trustee of the *second* mortgage, and the trustee of the *consolidated* mortgage, and the trustee of the *equipment* mortgage, are all citizens of the same State with the plaintiff below. They are *indispensable* parties; and the litigation of the plaintiff below with them is as *real* as that with the trustee of the *first* mortgage.

The controversies in the suit, or the matters in the petition of the plaintiff below, which may be disputed, are as follows:

1st. The plaintiff claims the right to subject to the payment of his judgment all interest, *which the Railway Company has*, as mortgagor or otherwise, in the railroad and other real and personal property mentioned, or in their earnings, and in respect of their operation.

Probably this controversy, primarily and mainly, is wholly between the plaintiff below and the defendant Railway Company. In it the other defendants have no concern, unless it is in the ascertainment and definition of the interest of the Railway Company. In the ascertainment or adjustment of this interest, the other defendants, who are citizens of the same State with the plaintiff below, are equally and alike concerned with the appellant, who is a citizen of Pennsylvania.

If any controversy or dispute shall arise as to the question of the interest of the Railway Company in the property or its earnings, it is, perhaps, only incidental to the main controversy with the Railway Company as to the right to so subject its interest to the payment of the judgment.

2d. The plaintiff below claims to have a lien, by virtue of his judgment and levies of execution, upon the railroad and the other real and personal property. This lien is admitted, in the plaintiff's petition, to be subsequent to the mortgage liens of the defendants, citizens of New York and Pennsylvania. Be-

cause of the nature and use of the property, and also of the existence of these prior liens, the plaintiff cannot sell the property or enforce his lien by process *at law*. The plaintiff sets forth a right in Equity to have *all* the liens on the property ascertained, and their amount and order of priority adjusted, and to have the property sold free of *all* incumbrances, and the proceeds of such sale distributed according to the rights of *all* the parties as they may be found and determined by the decree of the Court. To this controversy, *all* the lien holders are necessary and indispensable parties. This controversy is not *wholly* between any part of them, nor can it be *fully* determined as between any part of them without a determination as between all. All incumbrancers are necessary parties to the suit, not merely to prevent a multiplicity of suits, but in order to grant adequate relief against any, and to protect the rights of all. Here the plaintiff asks relief against all the lien holders alike. If he sought or obtained relief as against some only of the incumbrancers, leaving the rights of others unaffected, it would, perhaps, under the laws of Ohio, avail him nothing. In such case, he might not be able to sell at two thirds of the appraisement, according to the Statute of Ohio regulating such sales.

If any dispute should arise as to the validity or amount of the plaintiff's lien under his judgment and executions, it would not concern the mortgagees, who have *prior* liens, (unless they are concerned in the right of the plaintiff to proceed against the property at all, or to have it put to sale.)

The plaintiff could not remove the suit on the ground that there is a controversy in it between him and the *first* mortagagee, which can be "*fully determined*" as between them *without the other parties*. The plaintiff and the first mortgagee are citizens of different States; but other citizens of the same State with the plaintiff are necessary to a full determination of that contro-

versy. Is not the right to remove under the Act of 1875, *necessarily reciprocal?* Under that Act any one of the plaintiffs or defendants actually interested in such controversy may remove.

So far as marshalling the liens goes, each lien holder may have a distinct claim as against all the other lien holders, and may have a dispute with all the others as to the validity or amount of his lien. But this controversy (if it may be so called) is not separable from the controversies as to the other liens. It cannot be "fully determined" without a determination as to the others, so as to adjust the priority and order of all the liens, and grant full and adequate relief by a sale free from all incumbrances.

The plaintiff could not dismiss his suit as against the lien holders, citizens of the same State with him, and proceed against the citizen of Pennsylvania, and obtain against him the complete relief to which he would be entitled, if the other defendants were joined.

3d. The plaintiff claims to have an *equitable* lien on the railroad and its equipment for supplies furnished and money advanced for the betterment and improvement of the property. This lien, if established, will be prior and paramount to the lien of the first mortgagee who is a citizen of Pennsylvania, and to the liens of the second mortgagee and of the trustees of the consolidated and equipment mortgages, respectively, who are all citizens of New York and of the same State with the plaintiff. This controversy now concerns all the mortgagees alike. Who besides the Railway Company will be prejudicially affected by this claim of the plaintiff, if established, cannot now be known, nor can it be known until after a decree adjust-

ing the liens and a sale of the property. It depends on the amount which may be realized from such sale—upon future contingencies. It *may*, possibly, affect only the first mortgagee, or the second mortgagee, or the consolidated mortgagee, or the equipment mortgagee. All these parties are necessary for the full determination of this controversy. This controversy is not "*wholly*" between the plaintiff and the first mortgagee, nor can it be "*fully* determined" as between them. This controversy is between the plaintiff and all the mortgagees, and cannot be "fully determined" without a determination as between all. In this controversy, the plaintiff asks the same relief against all the mortgagees alike.

He asks, *as against all*, the adjudication and establishment of his claim and lien. Then he asks, as *incidental* thereto, an adjustment of all the liens, and a sale of the property, free from incumbrance. Adequate relief in either particular cannot be granted to him without a full determination of the whole controversy as between the plaintiff and the defendants, citizens of New York, as well as between the plaintiff and the defendant, citizen of Pennsylvania. The plaintiff had no election as to whether he would or would not make parties defendant the citizens of the same State with him. It was necessary for him to do so.

In *Blake vs. McKim*, 103 U. S., 339, Mr. Justice HARLAN says: "We are of opinion that Congress, in determining the jurisdiction of the Circuit Court over controversies between citizens of different States, has not distinctly provided for the removal from a State court of a suit in which there is a controversy not wholly between citizens of different States, and to a full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same State with one or more of the plaintiffs or defendants against whom the removal is asked."

The controversy upon the claims of the plaintiff is between him and all the mortgagees, citizens of New York and Pennsylvania. The controversy upon the claim of the first mortgagee is between it and all the other parties, who are citizens of a different State from it. But the controversy upon the claim of the first mortgage cannot be determined separately and independently of the controversy upon the claim of the plaintiff, in such a way as to afford the plaintiff an effectual or adequate remedy. They are so blended together as to be inseparable.

In *Donahue vs. Maraposa Land Co.*, 5 Sawyer, 170, SAWYER, Circuit J., says: "That test is that there must be a controversy which is wholly between the separate parties, which can be fully determined as between them *so as to be effectual in separate actions.*"

The first mortgagee could have brought an action to foreclose, marshal liens, and sell in the Federal court. Can a defendant in the State court, who has a claim which he may set up in that suit by cross-bill, and upon which he might have instituted an original suit in the Federal court, in all such cases remove the suit?

The reported cases show that a negative answer must be given to this question.

In *Ayers vs. Chicago*, 101 U. S., 184, the defendant Ayers claimed a judgment lien on the property conveyed in trust. He might have brought suit in equity to enforce this lien by a sale of the property. This controversy would have been between the judgment lien-holder Ayers, as plaintiff, who was a citizen of Alabama, and the defendants to such suit, Gage, the judgment debtor and grantor in trust, Taylor, the trustee, and the city of Chicago, the beneficiary of the trust, all of whom were citizens of Illinois. The controversy arising upon such

claim of Ayers would have been "wholly between citizens of different States," and Ayers might have filed an original bill in the Federal court. Still the court held that when he presented his claim by cross-bill in the suit by the city of Chicago, he could not remove the case. The controversy upon the claim of the plaintiff in that suit, the city of Chicago, was not "wholly between citizens of different States."

So in *Donahue vs. Mariposa Land Co.*, 5 Sawyer, 163, the Mariposa Land Company gave its first mortgage to Donahue, and its second mortgage to the Farmer's Loan and Trust Company. The Farmer's L. and T. Co. was a citizen of New York, and the Mariposa Land Company and Donahue were both citizens of California. The Farmer's L. and T. Co. might have filed its bill for foreclosure in the Federal court, as the controversy on such bill would have been between it, a citizen of New York, and the mortgagor and first mortgagee, who were citizens of California. But Donahue brought his suit to foreclose in the State court, and made the Mariposa Land Co. and the Farmer's Loan and Trust Company defendants. The Farmer's L. and T. Co. could not remove.

In *Ayers vs. Miswell*, 112 U. S., 192, Ch. Justice WAITE says: "The rule is now well established that this clause in the section" (second clause of § 2 of the Act of 1875) "refers only to suits where there exists a separate and distinct cause of action, on which *a separate and distinct suit* might have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. To say the least, the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun. *Frazer vs.*

Jenneson, 106 U. S., 191, 194. * * The fact that separate answers were filed which raised separate issues in defending against the one cause of action, does not create separate controversies within the meaning of that term as used in the stat ute. They simply present different questions to be settled in determining the rights of the parties in respect to the one cause of action for which the suit was brought."

In *Barney vs. Latham*, 103 U. S., 205, it was held that the claims of the plaintiff presented severable controversies, which he might or might not at his election join in the same suit, and that inasmuch as one of these controversies upon the *plaintiff's* claim was wholly between citizens of different States, the suit might be removed. The Chief Justice, and Justices MILLER and FIELD dissented. Would the Court go further and hold, that, although no controversy arising upon any claim of the plaintiff was wholly between citizens of different States, yet if the claim of *any defendant* presented a controversy which was wholly between citizens of different States, then the suit can be removed. Such controversy upon the defendant's claim may be (as it is here) against all the other parties, and can therefore be determined as between them. But the controversies upon the claims of the plaintiff are not wholly between citizens of different States. *They cannot be "fully determined" without determining the controversy upon the claim of the defendant. Nor can his be "fully determined" without determining the claims of the plaintiffs.* The order of liens cannot be adjusted without determining the validity and amount of each of them. Each claim presents a controversy with all the other parties, and to such controversy, the claimant is on one side, and all the other parties are on the other side. But the controversies are not independent, and cannot be "fully determined" in separate suits.

If the trustee of the first mortgage had commenced the suit as plaintiff, then the controversy upon his claim would have been wholly between citizens of different States, and the Federal Court would have had jurisdiction.

In *Meyer vs. Construction Company*, 100 U. S., 457, the Court say: "When the controversy *about which a suit in the State Court is brought*, is between citizens of one or more States on one side, and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court without regard to the positions they occupy in the pleadings as plaintiffs or defendants."

Here the controversy about which the suit is brought, are the controversies arising upon the claims of the plaintiff; and not being divisible, nor wholly between citizens of different States, the suit could not be removed.

The controversy is between the plaintiff below, who is a citizen of the State of New York, on the one side, and all the defendants below, two of whom reside in the same State with him, on the other side; and the case stated by him for relief is one and inseparable. It is not one capable of separation into parts, so that, in one of the parts, a controversy will be presented with a citizen or citizens of one or more States on one side, and citizens of other States on the other side, "which can be fully determined" without the presence of any of the other parties to the suit as it has been begun. The issues made by the pleadings do not create separate controversies, but only show the questions which are in dispute between the parties as to this one controversy.

There cannot be a decree *in favor* of the plaintiff against a part only of the mortgagees, and in favor of the others. Nor can there be a decree *against* the plaintiff and in favor of only some of the mortgagees.

The matter in dispute between the parties is the existence and priority of the plaintiff's alleged liens and equities as against the liens of all the mortgagees, upon the property of the Scioto Valley Railway Company, one of the defendants. Any decree which may be rendered in favor of or against the plaintiff will affect, directly, all the mortgagees. And if the appellant succeeds in the defense set up in its answer, the result will inure to the benefit of all the defendants; that is to say, it will inure to the benefit of the parties to one side of the controversy.

Ayers vs. Wiswell, 112 U. S., 187.

The appellant who filed the petition for removal is trustee of the first mortgage upon the property against which the appellee asserts certain equities and liens. The appellant is a citizen of the State of Pennsylvania. But the trustees respectively of the second and third mortgage upon the same property are citizens of the State of New York, of which State the appellee is also a citizen. And it is settled that when in the settlement of controversy, the plaintiff and *one* of the defendants, who is a necessary party for the complete determination of the issues and the matters involved, are citizens of the same State, the cause cannot be removed from the State court under the *first* clause of Section 2 of the Act of March 3, 1875. And that if the issue is not a separable controversy,—that is, a controversy wholly between citizens of different States, and which can be fully determined as between them without the presence of the other party or parties to the suit who are citizens of the same State with the parties to such distinct dispute,—the case is not removable under the *second* clause of said section.

The separable controversy, entitling a party to a removal, must arise on the plaintiff's bill and be in *his* suit. If citizens of the same State with *the plaintiff* are indispensable parties to

the controversies arising upon and presented by his bill, and such controversies cannot be fully determined without them, then the case is not removable.

There is only one suit in equity, and that is the suit of the plaintiff. A defendant cannot, by a cross-bill, create a new or different suit, and upon a claim that such suit is a new one, and that in it there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, have the suit of the plaintiff removed. If a defendant's suit is separable from and independent of the suit of the plaintiff, it cannot be instituted by a cross-bill.

In *Pirie vs. Tvedt*, 115 U. S., 41, MR. CHIEF JUSTICE WAITE says: "A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. *The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.*" * * *

"The cause of action is several as well as joint, and the plaintiff might have sued each of the defendants jointly. *It was for the plaintiffs to elect which course to pursue.* They did elect to proceed against all jointly, and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only, does not divide a joint action in tort into separate parts any more than it does a joint action on contract." P. 43.

The cases of *Crump vs. Thurber*, 115 U. S., 56, and *Starin vs. New York, &c.*, 115 U. S., 248, as well as the cases of *Louisville & Nashville Railroad Co. vs. Ide*, *Putnam vs. Ingraham*, 114 U. S., 52, and *Pirie vs. Tvedt* (*supra*), show that the present case was properly remanded.

See, also, *Winchester vs. Loud*, 108 U. S., 130;
Shainwald vs. Lewis, 108 U. S., 158;
Chicago & N. W. Railroad vs. Crane, 113 U. S., 424.

There is nothing in any of the reported cases indicating the existence of a right of removal founded upon a defence and counterclaim set up by one of several defendants in a case where one or more of his co-defendants are citizens of the same State as the plaintiff and such co-defendants are necessary parties to a complete determination of the matters involved in the suit.

Such an answer as that filed by the appellant in the court below under the Ohio Code system of pleading, containing an affirmative defence to the alleged right of action, and also, *perhaps*, a counterclaim against the plaintiff and the co-defendants of the defendant so pleading, is, evidently, merely a step taken in the original action. It is not the commencement of a new suit. Under the Federal system of pleading, where common law actions and suits in chancery are in distinct forums and the mode of pleading is different, a cross-bill is not the commencement of a new suit. It is considered as merely a dependency upon the original bill; and when it is matter of defence, is disposed of by the original bill. This is the established doctrine in American practice.

The filing of a cross-bill cannot, therefore, affect the jurisdiction, as it is but a mere appendage to the original bill, constituting with the original bill but one suit.

Ayer vs. Carver, 17 How., 595;
Slason vs. Wright, 14 Vt., 210;
See, also, *Rubber Co. vs. Goodyear*, 9 Wall., 809;
Cross vs. Del Valle, 1 Wall., 5;
Field vs. Scheffelin, 7 Johns. Ch., 252;
Gallatin vs. Irwin, Hopk. Ch., 59.

If the filing of a cross-bill were regarded as the commencement of a new suit, then nothing could be removed but such new suit. Its removal could not operate as a removal of the suit first begun.

Opposing counsel appear to lay stress upon the terms of their mortgage entitling them to possession. I do not perceive what this has to do with the question of removal.

But the appellant does not pray for or seek to recover possession of the road. The record shows that the road was in the hands of a receiver appointed in this suit for the benefit of all parties. The appellant in its so-called cross-petition does not ask that the road be transferred from the receiver to them. On the contrary, it prays that its mortgage be foreclosed, and the premises be ordered to be sold in this suit. Its allegations as to the right of possession are pertinent only to its claim to be entitled to first receive any income that may accrue while the road shall be operated by the receiver.

The appellant's answer may be considered, *perhaps*, a cross-petition under the Ohio Code of civil procedure. If so, it is merely because of the prayer. The allegations profess to be in answer to the allegations of the petition, and in bar or avoidance of the plaintiff's claim to any relief. It would not be a sufficient cross-bill under the established equity practice; and no subpoena thereon is sued for. But this is, perhaps, all immaterial.

To show that the whole course of judicial decision, as well as of legislation, has proceeded upon the principle that where in a suit a controversy between citizens of the same State is so blended with a controversy between citizens of different states as to be inseparable, the suit cannot be removed from the State Court into a Federal Court, we cite a few of the many cases determined by inferior courts, to that effect.

"Where D., a citizen of California, filed a bill to foreclose a mortgage against M. the mortgagor, also a citizen of California, and F., a subsequent incumbrancer, and a citizen of New York, there can be no final determination of the controversy between D. and F. without the presence of M., and the suit is not removable by F. to the Circuit Court of the United States under Section 639 of the Revised Statutes.

"Neither in such case where the only controversy is as to the validity of the mortgage, and whether there is anything due on it, is there 'a controversy which is wholly between citizens of different States' or 'which can be fully determined as between them,' within the meaning of Section 2 of the Act of March 2, 1875, 18 Stat., 470, and the case can not be removed to the national courts under the provisions of that Act."

Donahoe vs. Mariposa Land Co., 5 U. S., Ct. Rep. 163.

"Where an action has been brought against an insolvent corporation under the special provisions of chapter 76 of the Minnesota General Statutes of 1878, in the State Court, and a creditor, who is a citizen of another State, has, by order of that Court, obtained leave to be made a party to the suit, he must proceed by supplemental bill or complaint to become such party, and as *this is not an original suit, but an ancillary and auxiliary proceeding*, where the parties to the original suit are citizens of the State of Minnesota, he cannot remove the case into the federal court."

Hospes vs. Northwestern Manuf'g & Car Co., 22 Fed., Rep. 565.

"The plaintiff, claiming that by a contract with him the defendants became lessees of a plantation, of which he became owner, sued them for rent, and asserted his lessor's lien upon all effects found upon the premises. The parties all lived in the same State. A citizen of a different State intervened,

claiming to be the owner of a part of the effects in question, and praying, as essential to his relief, that the contract between the plaintiff and the defendants be decreed to be a mere mortgage, giving the plaintiff no rights of ownership. *Held*, that there was no separable controversy wholly between the intervenor, on one side, and the other parties upon the other, such as to give him the right to remove the cause into a Federal court."

Freidler vs. Chotard and Husband, 19 Fed. Rep. 227.

BOARDMAN, J., Ibid. 230: "In discussing the matter of separable issues, or in ascertaining whether such a separable controversy as is contemplated in the Act of 1875 is presented by the intervenor, it should be kept in mind that Young asserts his ownership of the stock, etc., his right to the exclusive management of the plantation business, his right to enjoy one-half of the revenues thereof for 10 years, and his right to have all his demands and claims made executory against all parties to the suit. This summary of his demands appears to me to forbid the idea that any court could allow or deny to him any of them without, at the same time, passing on controversies which, before his appearance in the suit, existed solely between the plaintiff and defendant, or on matters alleged and denied by and between citizens of the same State, and which are inseparably blended with all the items of the intervenor's demand, and to the allowance of which all the parties are necessary parties." * * *

"All three of the litigants have controversies together, and against one another. The several things claimed by Young form, more or less, the subject matter of a controversy between Freidler and Mrs Chotard, and he could not obtain a judgment in any court allowing him any one of the rights or things claimed, without such judgment operating upon and binding

plaintiff and defendant as to matters and things about which they are actually disputing."

"When a cause is brought within the terms described in the second and third sections of the Act of March 3, 1875, the whole suit is removed, and not a part; and if a person has only such an incidental interest as stated growing out of the litigation he cannot remove the cause."

Ellis vs. Sisson, 11 Fed. Rep., 353.

DRUMMOND, C. J.: "This is a motion to remand this cause to the Circuit Court of Peoria County, from whence it came. It is a controversy of many years' standing, to which John M. Waugh, at one time the owner of 480 acres of land in Mercer County, Benjamin T. Sisson, who, with Waugh, had erected a steam flouring mill, Henry B. Ellis, and others were parties. The facts are very complicated, and many questions have arisen in the course of the litigation in which different parties and different interests have been involved. The object has been to dispose of the property in such a way as to have the proceeds divided for the benefit of various claimants; a principal controversy being, who had the prior claim and lien upon the property?" * * * * "It was after all this had taken place that in May, 1881, Hiram Cable and Robert Lee for the first time appeared in the case and filed their respective petitions in the Circuit Court of Peoria County, claiming that since the litigation had commenced they had made valuable improvements on a part of the land, for which they were entitled to a lien, and asking that it should be recognized in the distribution of the proceeds in any sale that might be made of the property. On the twenty-eighth and twenty-ninth of July, 1881, Cable and Lee filed their respective petitions and bonds for the removal of the cause to this court, on the ground that there was a controversy between them and citizens of other states which could be fully determined as between them, and the question is

whether they had the right under the act of 1875 to remove the cause to this court, and I think that they had not. It has been decided by the Supreme Court of the United States (*Barney vs. Latham*, 103 U. S., 205) that when a cause is brought within the terms described in the second and third Sections of the Act of 1875 the whole suit is removed, and not a part; so that, if this case was properly removable, it brings with it the whole litigation connected with this controversy and the innumerable questions which have arisen during its progress. It will be observed from the statement which has already been made that this is a controversy which has sprung up many years after the litigation commenced, and not one which existed at the time that the suit was instituted, and it is, besides, an incident of the litigation; and I can hardly believe that it was the intention of Congress, when it declared that in any suit mentioned in the last clause of the second Section of the Act of 1875 there should be 'a controversy which is wholly between citizens of different States and which can be fully determined as between them,' it meant an incidental controversy of this kind which might arise during the progress of the cause, and where parties might come in for the protection of their interests. If this be the true construction of the Act of 1875, then it is easy to see there will be no end to instances where, during a protracted litigation in which property may be in charge and subject to the jurisdiction of the State court, an application can be made, where the citizenship of the parties may authorize it, for the removal of the suit to the Federal court."

Respectfully submitted,

RICHARD A. HARRISON.

COLUMBUS, OHIO, *Feb.* 22, 1886.

117-280

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1,236.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, APPELLANT,

vs.

COLLIS P. HUNTINGTON,

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE APPELLEE.

This is an appeal from an order of the Circuit Court remanding the case to the Court of Common Pleas of Scioto county, Ohio, whence it had been removed upon the petition of the appellant.

The appellee, C. P. Huntington, a citizen of New York, is the sole plaintiff in the action. The defendants are, four of them, citizens of the same State with the plaintiff; one of them, the appellant, a citizen of Pennsylvania; and the rest, eleven in number, citizens of Ohio. The right of removal is claimed by the appellant under the second clause of Section 2 of the Act of March 3d, 1875, upon the ground that there is in the case a separate controversy, to-wit: a controversy between the appellant, a citizen of Pennsylvania, on one side, and all the other parties to the suit, being citizens of New York and of Ohio, on the other side. The necessary citizenship exists if there in

fact be such a separate controversy in the case. The simple question is whether the controversy relied on is separate within the meaning of the second clause of the removal Act of 1875.

What is the action? The plaintiff alleges, in his petition, that he has recovered a judgment against the principal defendant, the Scioto Valley Railway Company; that he has levied execution on its railroad and appurtenances, whereby he has acquired a lien thereon; that said property is incumbered by certain mortgage and judgment liens, making it impossible to sell the same to advantage, upon execution at law, and as to the personal property levied on, that it can not be disconnected and removed without stopping the operation of the railroad, and impairing its value as an entirety and going concern; that the company has no other property subject to levy and execution; and thereupon the plaintiff makes all persons holding liens on the railroad, parties defendant, and prays that they set up their liens, that the road may be sold as an entirety, and the proceeds distributed to the parties according to the priority of their liens, which the court is asked to marshal and determine; and, as affecting the priority of his own lien, the plaintiff alleges that the consideration for his judgment was the supplying and laying of steel rails, the supplying of locomotives and cars, the bettering and improving of the railroad and its equipment, and the advancement of money to be used, and in fact used for said purposes.

In brief, the plaintiff's suit is one in equity to secure the sale of the railroad as an entirety, and free from incumbrances, the appointment of a receiver meantime, and the distribution of the proceeds of the sale among the lien-holders, according to their priorities. His right to go into equity rests upon the inadequacy of the remedy, which, under the circumstances, is afforded by a sale on execution at law. The essential and primary right insisted upon is to have the court of equity take possession of the property and sell it.

Manifestly, in such a suit there can be but two controversies:

one as to the right of the plaintiff to have the court take possession and sell, the other as to claims of priority in the distribution of the proceeds of sale. A controversy upon either point made by the Fidelity Insurance Trust and Safe Deposit Company, would not entitle that company to remove the case. Because if it controverts the right of the plaintiff to have the road seized and sold, in other words, the plaintiff's right to relief, it is simply the case of a separate defence by one of several defendants, against all of whom, jointly and severally, the plaintiff is asserting the same right, and asking the same relief, to-wit: that the road be sold free of liens; and the case is covered by Starin *vs.* New York, 115 U. S., 248, and the cases there cited.

If the Fidelity Co.'s controversy is, on the other hand, as to the priority of its lien, such controversy relates to the distribution of the proceeds of sale, and is, therefore, necessarily incidental to the main purpose of the suit. No such controversy can arise unless the primary relief is granted. It is necessarily dependent upon, and incidental to, the main relief. It follows the sale. It can not arise unless there be a sale. It presupposes a sale and is concerned only with the distribution of its proceeds.

But it is well settled by this court that a controversy concerning matters dependent upon, or incidental to, the main purpose of the suit, does not give the right of removal.

In Ayers *vs.* Wiswall, 112 U. S., 193, the case was held not removable, because, in the language of the Chief Justice, "The personal decree which is asked against Wiswall is *incident* to the main purpose of the suit." And in Shainwald *vs.* Lewis, 108 U. S., 158-161, the Chief Justice said: "As has already been said, the suit was brought to close up the affairs of an alleged partnership. The main dispute is about the existence of the partnership. All the other questions in the case are *dependent* on that. If the partnership is established, the rights of the defendants are to be settled in one way; if not, in another. There is no controversy in the case which can be

separated from that about the partnership, and fully determined by itself."

The necessarily incidental character of controversy as to priority of lien in such a suit as the one at bar, is demonstrated by two suggestions:

First. The plaintiff in such an action has a right to maintain his suit, and to the equitable relief which it affords, although all the parties to the suit are agreed as to the order and priority of their liens, and there is, therefore, no controversy with respect thereto.

Second. Whether there is any ground for controversy as to priority of lien, depends in such a case altogether upon the amount that is realized from the sale. If the property brings sufficient to pay all of the various claims, priority between which is disputed, there can be no controversy. In other words, controversy as to priority in right of distribution necessarily waits upon the main purpose of the suit.

While we have shown that the case would not be removable, even if the Fidelity Company disputed our right to have the court take possession and make sale of the property, there is, in fact, no denial of that right by any defendant. The principal defendant, the Scioto Valley Railway Company, has filed an answer admitting all of the allegations of the plaintiff's petition, and his right to the relief prayed for. The other defendants admit, either expressly or by failure to deny, the plaintiff's right to have the court take possession of the road and sell it, and content themselves with setting up each his claim of right with respect to priority of distribution.

This is true of the answer of the Fidelity Company. It simply denies that the plaintiff has any lien, except subject to its lien, which it asserts to be superior. And while it alleges that the plaintiff's lien is subject to its right of immediate possession of the property, it does not pray for possession of the property, nor for the removal of the receiver; but, on the contrary, prays that its mortgage may be foreclosed and the property sold

under the order of the court. And as to its right of possession, even if there were a prayer for possession, the facts alleged show that it can not, under the mortgage, demand possession, unless first requested so to do by the holders of at least one third in amount of the outstanding bonds secured by its mortgage, and there is no allegation of any such demand on the part of the bondholders.

In short, the only controversy made, or that can be made, is as to priority of distribution, and we submit that it requires no more than a statement of the case to show that a controversy upon that point is necessarily incidental to the main purpose of the suit, and can not be made the ground for removal on the part of any defendant.

Respectfully submitted,

WM. M. RAMSEY,
LAWRENCE MAXWELL, JR.
MORTIMER MATTHEWS,
Of Counsel for the Appellee.

R. A. HARRISON,
W. A. HUTCHINS,
Of Counsel.